Supreme Court, U. S.
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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5435

PAUL KERN IMBLER,
Petitioner,

—v.—

RICHARD PACHTMAN, District Attorney,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 17, 1974
CERTIORARI GRANTED FEBRUARY 24, 1975

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

71-123-RJK

Jury demand date:

PAUL KERN IMBLER, PLAINTIFF

vs.

RICHARD PACHTMANN, as an individual, RICHARD PACHTMANN, as an agent of the County of Los Angeles, Office of the District Attorney, Joseph Busch, District Attorney of the County of Los Angeles; DE WITT LIGHTNER, as an individual; SANFORD MCCALEB, as an individual; KENNETH W. SCARCE, as an individual; ECTOR A. GARCIA, as an individual; DEWITT LIGHTNER, SANFORD MC CALEB, KENNETH W. SCARCE, DONAL H. SEARS, and ECTOR A. GARCIA, as police officer agents of the City of Los Angeles, Department of Police, EDWARD M. DAVIS, Chief of Police of the City of Los Angeles, JAMES NUNNELLEY, as an individual, JAMES NUNNELLEY as an agent of the County of Los Angeles, Office of the Public Defender, RICHARD BUCKLEY, Public Defender, RICHARD BUCKLEY, Public Defender of the County of Los Angeles, MANLEY J. BOWLER as an individual, MANLEY J. BOWLER as a member of the Adult Authority of the State of California, WILLIAM MC KESSON, as an individual, and as an agent of the County of Los Angeles, EVELLE J. YOUNGER as an individual and as an agent of the County of Los Angeles and of the State of California, ALBERT —. HARRIS as an agent of the State of California and as an individual, THOMAS C. LYNCH, as an agent of the State of California, DEFENDANTS

For plaintiff:

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Statistical Record	Costs	Date	Name or Receipt No.	Rec.	Disb.
J.S. 5 mailed	Clerk	1/15/71	13240	15—	1-19-71
		7/5/72	53370	5—	7/6/72
J.S. 6 mailed	Marshall				
Basis of Action: Civil Rights Complt	Docket fee				
	Witness fees				
Action arose at:	Depositions				

DOCKET ENTRIES

DATE	PROCEEDINGS
1/15/71	Fld Complt for Violation of Civil Rights. Issd summs—Md JS-5.
1/23/71	Fld retn of summs.
5/12/71	Fld not of hrg retable 6/1/71 to show cause why the action should not be dismissed for lack of prosecution.
5/17/71	Fld prae for & issd alias summs as to Richard Pachtmann, DeWitt Lightner, Sanford McCaleb, Kenneth W. Scare, Ector A. Garcia and Donal Sears.
5/18/71	Fld plf return to the OSC.
5/19/71	Upon request of cnsl for plf & good cause appearing, it is ord that hrng on OSC re: dismissal is cont for hrng to 6/21/71, 10 AM.

DATE	PROCEEDINGS
6/10/71	Fld retn of alias summs.
6/16/71	Fld deft's McCaleb & Garcia affid of John T. Neville in support of ex parte ord extending time to plead; LODGED proposed ex parte ord extending time to plead.
6/28/71	Fld pltf's reqst for & entered dflt as to Sanford McCaleb: Fld pltf's reqst for & entered dflt as to Ector A. Garcia.
*6/21/71	Ct ords hrg On OSCre: dismissal cont to 7/12/71, at 10am.
7/12/71	Fld ex parte ord (RJK) extending time of plead to the complt retable 7/26/71.
7/16/71	Fld deft's affid of service by mail.
*7/12/71	Cnsl for plft informs ct re: status of case as to svc of defts. Ct ords fur hrng on OSC re: dismissal cont to 10/18/71, at 10am & fur ords that defaults htf ent as to defts Garcia & McCaleb are set aside.
7/27/71	Fld deft's McCaleb & Garcia affid of John T. Neville in support of ex parte ord extending time to plead.
8/ 2/71	Fld ex parte ord (RJK) extending time to plead retable 8/25/71.
8/25/71	Fld ANSWER of the deft, Ector A. Garcia, to the plft's complt; Fld ANSWER of the deft, Stanford R. McCaleb, to the plft's complaint; Fld deft's McCaleb Q Garcia demand for Jury Trial.
9/ 9/71	Fld interrogs propounded to deft Richard Pachtmann.
9/28/71	Fld plft interrogs propounded to deft Ector A. Garcia; Fld plft interrogs propounded to the deft Sgt. Sanford McCaleb.

DATE	PROCEEDINGS
10/18/71	Cnsl for plft informs ct that he has had trouble serving some deft's because the City Atty's office will not disclose the addresses of certain police officers who have retired. The ct informs cnsl for plft to go talk to the City Atty's office again re: svc of certain deft's & to mk clear to the City Atty ct's position on this problem. Ct ords fur hrng on OSC cont to 11/8/71, at 10am.
11/ 2/71	Fld Richard Pachtmann, not of mot retable 11/29/71, at 2 PM, mot to dismiss & pts & auths.
11/ 8/71	Fld stip & ord (RJK) extending time to ans or object to interrogs requested by plft of deft's, Ector A. Garcia & Standford R. McCaleb retable 12/15/71. Fur hrng held on OSC re: dismissal & ct informs cnsl for plft that the Clerk has the addresses of the defts the plft wants in order to sve said deft's; that the Clerk will give the addresses to the US Marshall & will have the addresses ord put under seal after the defts have been svc. Ct ords fur hrng cont to 1/17/72, at 10am.
11/23/71	Fld plft pts & auths in oppos to mot to dismiss case against Richard Pachtman;
11/29/71	No appearance by cnsl for deft, Ct ords deft's mot to dismiss as to deft Pachtmann denied. Cnsl for plft to prepare ord pur to Local Rule 7.
12/ 2/71	On Crt's own mot, ord mot of deft Richard Pachtmann is cont for hrg to 12/14/71, 9:30 am.
12/14/71	Hrng held by ct on deft Pachtmann's mot to dismiss. Cnsl argue mot to ct. Ct ords mot to stand submitted.

DATE	PROCEEDINGS
12/15/71	Fld ans to interrogs propounded to deft Ector A. Garcia, by plft; Fld ans to interrogs propounded to deft Stanford R. McCaleb, by plft.
1/12/71	Fld Prae for & Issd Second Alias Summs.
1/17/72	No appearance by cnsl for plft. Ct ords case dismissed as to all defts not yet served. Clrk to enter ord.
1/12/72	Fld plft interrogs propounded to the deft DeWitt Lightner; Fld plft interrogs propounded to the deft Donal H. Sears.
1/19/72	Fld disml by court for lack of prosecution as to certain defts.; JOSEPH BUSCH; EDWARD M. DAVIS; JAMES NUNNELLLEY; RICHARD BUCKLEY; MANLEY J. BOWLER; WILLIAM KcKESSON; EVELLE J. YOUNGER; ALBERT W. HARRIS & THOMAS C. LYNCH, mld cpys (Ent 1/20/72) ntfd prtys
2/ 4/72	Fld Ex Parte Ord (RJK) extend time to defts, De Witt Lightner, Donal H. Sears and Kenneth W. Scarce, to plead to complnt and extend time to defts, Donal H. Sears and De Witt Lightner, to respond to interrogs by pltf; Affidavit of John T. Neville in support of ord. retnbl 3/3/72 to plead complnt & 4/3/72 to answer or object to interr
2/11/72	Fld deft's affid of service by mail.
2/23/72	Fld Donal H. Sears mot & not of mot retnbl 3/13/72, 10am to dismiss complnt, Alternative mot for a more definite stmt and pts & authors in support thereof; Fld De Witt Lightner mot & not of mot retnbl 3/13/72, 10am to dismiss complnt; pts & authors in support thereof.: Fld Kenneth W. Scarce mot & not of mot retnbl 3/13/72, 10am to dismiss complnt; pts & authors in support thereof.

DATE	PROCEEDINGS
3/13/72	Fld plft not of mot retable 4/3/72, 10 am, to compel ans to written interrogs. Fld Paul Kern Imbler oppos to mot to dismiss pts & auths; Fld amendment to paragraph II page 10-11 of Complt, response to request for more definite & certain allegations; Hrg held by ct on defts Lightner, et al's mot to dismiss & ct ords mots under submission. Later, ct ords mots to dismiss denied w/o prej; that plft has until 4/13/72 in which to file amended complt as to defts Lightner, Sears & scare.
4/ 3/72	Fld ans to interrogs propounded to deft Donol H. Sears, by plft; Fld ans to interrogs propounded to deft, DeWitt Lightner, by plft.
4/ 4/72	On ct's own mot, ord hrng on pltf's mot to compel ans to interrogs is cont for hrng to 4/17/72, 10am.
4/11/72	Fld ord (RJK) denying mot of defts Scarce, Sears, & Lightner to dismiss.
4/14/72	Fld plf's mot to compel ans to written interrogs.
4/17/72	Ct informs cnsl that mot of deft Pachtmann presently under submission will be granted & ct will ent fld ord shortly. Fur ord that plft's mot to compel ans to interrogs is cont for hrng to 5/22/72, at 10am & that ct's ord of dismissal will contain a stay ord & certify mot to dismiss for purposes of appeal.
4/18/72	Fld Plf's FIRST AMENDED COMPLAINT. Fld deft's pts & auths affid in oppos to mot to compel ans to written interrogs.
5/ 1/72	No appearance by cnsl for plft. Ct ords plft's mot re: ans to interrogs cont for hrng to 6/5/72, 10am & cnsl for deft has until 6/5/72 in which to respond to amended complt.

DATE	PROCEEDINGS
5/ 4/72	Fld deft's not of contd of mot to compel ans to interrogs to 6/5/72.
5/22/72	Ct ords hrng on plft's mot to compel ans to interrogs is cont to 6/26/72, at 10am.
6/ 5/72	Fld deft's Sears, Lightner, McCaleb, Garcia & Scarce not of mot retable 6/26/72, 10am, & mot to dismiss first amended complt, pts & auths in support.
6/ 5/72	Ct ords plft's mot for and ord compelling ans to interrogs by defts Sears & lighter off cal, subject to being restored to to cal on notice by plft.
6/30/72	Fld opin & ord grntg deft's mot to dism & directing entry of final judmt; Fld judgmt & ord thereon that the action be dismd as to deft Richard Pachtmann. (Ent 6/30/72) mld cpys & ntfd prtys
7/ 5/72	Fld plft NOTICE OF APPEAL, w/affid of service, copies to (RJK) & R.E.; Fld plft designation of records on appeal.
*6/26/72	Ct informs cnsl that opinion & ord dism Pachtmann will be signed today & ords all mots now pending & all matters off cal.

[Crim. No. 6999. In Bank. May 17, 1962.]

THE PEOPLE, PLAINTIFF AND RESPONDENT,

v.

PAUL KERN IMBLER, DEFENDANT AND APPELLANT.

* * * *

APPEAL automatically taken under Pen. Code, § 1239, subd. (b), from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Mark Brandler, Judge. Affirmed.

Prosecution for murder and for assault with a deadly weapon with intent to commit murder. Judgment of conviction imposing the death penalty on the murder count, affirmed.

Gregory S. Stout, under appointment by the Supreme Court, for Defendant and Appellant.

Stanley Mosk, Attorney General, William E. James and Gilbert F. Nelson, Assistant Attorneys General, for Plaintiff and Respondent.

TRAYNOR, J.—Defendant was convicted of first degree murder and of assault with a deadly weapon with intent to commit murder. The jury fixed the penalty at death, and the trial court denied defendant's motion for a new trial. This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

On the evening of January 4, 1961, two men entered a Los Angeles grocery store owned by Morris Hassen. They walked to the check stand where Mr. Hassen was leaning down dusting liquor bottles. Mrs. Hassen, who was standing nearby, testified that she moved to the check stand to wait on the men, that as she did so she noticed her husband getting up from behind the stand and that "by the look of his face" she could see that something was wrong. When she bent down to ask what the trouble was, she saw a gun protruding from the coat of the man

subsequently identified by other witnesses as defendant. A moment later the gun discharged, fatally wounding Mr. Hassen. The men turned, walked from the store, and departed in different directions.

At the trial defendant denied participating in the crime. His defense consisted primarily of an alibi and impeachment of the identification witnesses. The evidence, however, was more than sufficient to establish that he did the shooting. Although Mrs. Hassen was unable to see his face because his hat was tilted, she was able to identify the hat and coat he was wearing. She identified the second man from police photographs as Leonard Lingo, who was killed 10 days after the shooting when he accompanied defendant on an armed robbery in Pomona.

Alfred Costello, an identification witness, was walking on the opposite side of the street when his attention was attracted to the store by two men standing at the cash register. When he heard a shot he crossed the street to investigate, and in a lighted area in front of the store and at a distance between 8 and 12 feet, he viewed defendant who was still wearing the hat and coat and still carrying a gun. According to Costello, defendant turned into an alley, dropped his hat, and began to run. Costello gave chase. Defendant paused in the alley under a light as if "trying to make up his mind whether to go right or left," and Costello was able to see him without the hat at a distance between 15 and 20 feet. Defendant then fired a shot that hit a wall behind Costello, discarded his coat, and fled through a parking lot. Costello retrieved the coat and discovered a gun in it identified by a ballistics expert as the murder weapon. Costello positively identified defendant as the man he had pursued.

Alonzo Dunlap, an attendant at the parking lot through which defendant escaped, testified that he got a side and front view of defendant as he walked through the illuminated lot. Although Dunlap did not hear any shots, his testimony otherwise corroborated Costello's testimony.

Billy Hillen, a third witness, was leaving the market when defendant and Lingo entered. He testified that he got a good look at both men, and he identified defendant's hat and coat. When Hillen had walked only a few steps

from the store, he heard a shot and turned around. He again looked closely at the two men as they left the store, and observed defendant holding a gun. Hillen had no difficulty in picking defendant out of a lineup at police headquarters, and he also identified defendant at the trial.

Defendant testified that he spent the evening of the shooting in various bars with Jerry Mayes, Robert Mahon, and two men whose names he could not recall, and that he was also accompanied by a girl named Ann at the bar where he claimed to be at the time of the killing. Only Mayes could be located to testify in defendant's behalf, although an investigator attached to the public defender's office attempted to trace the others. Mayes, who was in custody for accompanying defendant and Lingo on the Pomona robbery, corroborated defendant's testimony on all but minor points. On cross-examination, however, he admitted that "it's hard to be certain" that the evening he recalled was the night of the murder. Dewitt Lightner, a police officer, testified that he had asked defendant if he had any alibi that could be checked out, and that defendant replied in effect that he could not account for his time, but that he was probably drinking at the Four Aces Bar, and that he also said there was no one with him who could account for his time.

Defendant contends that even if the evidence was sufficient to sustain a finding that he was the killer, it did not demonstrate that a robbery was being perpetrated that would make the killing murder in the first degree. (Pen. Code, § 189; *People* v. *Coefield*, 37 Cal.2d 865, 868 [236 P.2d 570].) The only instructions given to the jury on degrees of murder were: "Murder is classified into two degrees, that of murder in the first degree and that of murder in the second degree" and "All murder which is committed in the perpetration or attempt to perpetrate robbery is murder of the first degree." The court also defined robbery and attempt. Admittedly, there was no evidence that defendant or Lingo demanded money of the deceased or that they took money after the killing. Indeed, since defendant asserted throughout the trial that

he was not the killer, there was no explanation why the gun discharged. [1] The evidence establishes, however, that defendant and his confederate entered the store of a total stranger with a loaded gun at the ready; they walked to the cash register and shot the proprietor when he emerged from under the counter. These were overt acts toward committing a robbery that clearly justify an inference that there was a specific intent to commit that crime. Such intent may be established by the circumstances surrounding a defendant's actions. (*People* v. *Jennings*, 158 Cal.App.2d 159, 165-166 [322 P.2d 19]; see *People* v. *Hubler*, 102 Cal.App.2d 689, 695 [228 P.2d 37]; *State* v. *Burnett*, 37 Wn.2d 619 [225 P.2d 416, 417-418].) [2] The inference that defendant intended to commit robbery is also supported by his subsequent participation with Lingo in the robbery in Pomona, evidence of which was admitted without objection and indeed elicited in part by the defense. (See *People* v. *Coefield*, *supra*, at pp. 869-870; *People* v. *Peete*, 28 Cal.2d 306, 315-316 [169 P.2d 921]; 7 U.C.L.A. L.Rev. 463.) [3] There was no evidence offered tending to show that defendant entered the store for any purpose other than robbery, and it is difficult to conceive of any other purpose. The trial court, therefore, did not err in failing to instruct on second degree murder. (*People* v. *Green*, 13 Cal.2d 37, 44 [87 P.2d 821]; *People* v. *Lloyd*, 98 Cal.2d 305, 311 [220 P.2d 10]; *People* v. *Sameniego*, 118 Cal. App. 165, 170-171 [4 P.2d 809, 5 P.2d 653]; see *People* v. *Moran*, 18 Cal.App. 209 [122 P. 969].)

Defendant contends that the trial court committed prejudicial error in admitting hearsay evidence. Before defendant was taken into custody a police artist made a drawing of the killer as described by the witness Costello. The picture was modified later, following suggestions of Costello and other witnesses. At trial, Costello was shown the picture, and he identified it. The picture was first admitted into evidence without objection, but defendant's counsel was later allowed to interpose the objections of lack of foundation and immateriality. The picture was again admitted. Although the picture was a representation of extrajudicial declarations of the witness regarding the killer's physical characteristics, Costello, the po-

lice artist, and other identification witnesses all testified and were cross-examined on the matter. (See *People* v. *Gould*, 54 Cal.2d 621, 626 [354 P.2d 865]; Morgan, Hearsay Dangers, 62 Harv.L.Rev. 177, 192-193.) [4] "[A]n extrajudicial identification is admissible, not only to corroborate an identification made at the trial [citation], but as independent evidence of identity." (*People* v. *Gould*, *supra*.) [5] Similarly this pictorial embodiment of a physical description is admissible for that purpose. The defense attempted to show that Costello identified defendant at a police lineup only after he had heard the other witnesses do so. The implication that he could not make a certain identification could be offset by showing that he had previously described defendant with sufficient accuracy that an artist could construct a reasonable likeness of defendant after other witnesses made minor corrections.

[6] Defendant asserts that his counsel was unduly restricted in his *voir dire* examination of a prospective juror regarding the juror's views on capital punishment. Counsel has the right to inquire into the juror's opinions on the subject (*People* v. *Hughes*, *ante*, pp. 89, 96 [17 Cal.Rptr. 617, 367 P.2d 33]), but the record reveals that this right was not infringed. Defendant's counsel asked the juror whether he knew that an organization to which the juror belonged advocated retaining the death penalty. The juror answered that he did not, and at this point an objection was sustained as to the form of the question only. Counsel was then allowed to question the juror on his personal beliefs as opposed to those of the organization. Apparently counsel was satisfied with the answers, for he passed the juror for cause.

[7] There is no merit in defendant's contention that he was prejudiced by restrictions on his counsel's attempt to impeach the witness Costello on the ground he lacked mental capacity. The trial court allowed counsel the greatest latitude in his cross-examination. He was allowed to question Costello about commitment to mental institutions despite the fact that the most recent commitment was more than 10 years before the trial. Counsel

also asked a number of questions regarding recent treatment for mental disorder, and the answers were negative.

[8] Equally without merit is defendant's contention that he was not allowed to show that at the police lineup the witnesses were uncertain in identifying him and that they discussed among themselves whether he was the right man. The record reveals that the defense was allowed to explore the matter as thoroughly as desired and that the answers elicited were damaging to the defense. The objections sustained by the court were primarily to the form of questions asked. There is nothing in the record to indicate that counsel was unduly hampered in his cross-examination.

Defendant contends that the prosecutor's objections were so numerous that defense counsel was unable properly to conduct his case. Twice during the trial counsel objected to the court that he was being unduly harassed. The record, however, discloses no such harassment and indicates that the defense was permitted to present any relevant evidence it had.

[9] Defendant contends that his conviction must be reversed because he was taken into custody on January 14, 1961, but was not informed of the charges against him until the following February 14. Defendant was legally in custody during this time because he had pleaded guilty to the robbery in Pomona. Although he should have been taken before the magistrate on the murder charge within the time limit prescribed in Penal Code section 825, the failure to do so is not a ground for reversing the conviction. (*Rogers* v. *Superior Court*, 46 Cal.2d 3, 9-10 [291 P.2d 929].)

[10] Finally, defendant contends that under *People* v. *Love*, 56 Cal.2d 720, 731-732 [17 Cal.Rptr. 481, 366 P.2d 33, 809], he is entitled to a new trial on the penalty imposed because of the prosecutor's argument to the jury as to the deterrent effect of the death penalty. The prosecutor's discussion in that regard, offered to the jury as "another factor you can consider," was temperate and restrained and was only a brief and minor part of his argument. The error was therefore not prejudicial. (*Peo-*

ple v. *Garner*, *ante*, pp. 135, 156 [18 Cal.Rptr. 40, 367 P.2d 680].)

The judgment and order denying defendant's motion for a new trial are affirmed.

Gibson, C. J., McComb, J., Peters, J., White, J., and Dooling, J., concurred.

Schauer, J., concurred in the judgment.

[Crim. No. 7212. In Bank. Dec. 3, 1963.]

IN RE PAUL KERN IMBLER on Habeas Corpus

* * * *

PROCEEDING in habeas corpus to secure release from custody, or for a writ of error *coram vobis*, or other appropriate relief. Order to show cause discharged and petition denied.

Gregory S. Stout, Charles Hollopeter, Warren L. Ettinger, Albert C. Garber, Ellery E. Cuff, Public Defender (Los Angeles), Richard S. Buckley, Deputy Public Defender, Jules C. Goldstone and Low & Stone for Petitioner.

Stanley Mosk, Attorney General, John S. McInerny and Albert W. Harris, Jr., Deputy Attorneys General, William B. McKesson, District Attorney (Los Angeles), and Harry Wood, Deputy District Attorney, for Respondent.

TRAYNOR, J.—Petitioner was convicted of first degree murder and of assault with a deadly weapon with intent to commit murder. The jury fixed his penalty at death. This court affirmed the judgment and an order denying a motion for new trial. (*People* v. *Imbler*, 57 Cal.2d 711 [21 Cal.Rptr. 568, 371 P.2d 304].) In this proceeding, petitioner seeks a writ of habeas corpus, *coram vobis*, or other appropriate relief.

On January 4, 1961, two men entered a Los Angeles market, one of them shot and fatally wounded Morris Hasson, the proprietor, and they departed in different directions. The only eyewitness to the crime, Hasson's wife, was unable to identify the man who did the shooting, but later identified his accomplice. A passerby, Alfred Costello, ran toward the market when he heard the shot, and at the lighted entrance encountered a man leaving the store with a gun in his hand. Costello chased the killer through several parking lots adjacent to the store; the killer shot at Costello and dropped his hat and coat while making his escape. A pistol, later identified as the murder weapon, a razor in a plastic case, and a soiled handkerchief were in the coat.

Entirely on the basis of the identification testimony of several witnesses, petitioner was convicted of murdering Hasson in the perpetration of an armed robbery and of assault with intent to murder Costello. All attempts to tie the physical evidence at the scene of the murder to petitioner were fruitless, and a police expert testified that fingerprints on the murder weapon and on the razor and its case were too fragmentary to assign to anyone. Petitioner was identified as the man who left the store with a gun by Costello, who had seen the killer at the entrance of the store and again during the chase, by Billy Hillen, who was leaving the store as the two men entered and who testified that he had clearly seen them again as they left, and by Alonzo Dunlap, who was an attendant at one of the parking lots through which the killer escaped. Hillen and Mrs. Hasson identified the other man at the killing as Leonard Lingo, an accomplice of petitioner in an attempted robbery in Pomona on January 14, 1961. During this January 14 attempt, Lingo was killed and another accomplice, Jerry Mayes, was captured. On January 15, Imbler surrendered to the Pomona police.

Petitioner testified that he first met Lingo, whose identity as the accomplice of the killer was not disputed, on the morning of January 14 and that he spent the evening of January 4 with several other persons in various Los Angeles bars. Both alibis were corroborated by Mayes, his accomplice in the January 14 robbery attempt.

The petition alleges that the prosecution secured petitioner's conviction through the knowing use of perjured testimony and that newly discovered evidence completely undermines the entire structure of the case on which the

proscution was based. After examining the petition and the affidavits attached to it, we issued an order to show cause and appointed the Honorable Thomas P. White, retired Associate Justice of this court, as referee to take evidence directed to the following questions:

"1. Did any witness who testified against Paul Kern Imbler in the trial which resulted in the judgment of conviction, affirmed by this court in *People* v. *Imbler*, 57 A.C. 757 [57 Cal.2d 711 (2 Cal.Rptr. 568, 371 P.2d 304)], commit perjury as defined in the Penal Code of the State of California?

"2. In the event that any witness did commit perjury, did any representative of the State of California cause or suffer such testimony to be introduced, knowing such testimony as given was perjured?

"3. Did any representative of the State of California suppress or prevent the introduction of any evidence which, had it been given, would have been favorable to the defense of Paul Kern Imbler?

"4. What if any new evidence has been discovered that undermines the case presented by the prosecution at the time of the judgment of conviction of Paul Kern Imbler?"

[1] A judgment of conviction based on testimony known by representatives of the state to be perjured deprives the defendant of due process of law (*Mooney* v. *Holohan*, 294 U.S. 103, 112-113 [55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406]; *Pyle* v. *Kansas*, 317 U.S. 213, 216 [63 S.Ct. 177, 87 L.Ed. 214]) and may be attacked on habeas corpus (*In re Mooney*, 10 Cal.2d 1, 15 [73 P.2d 554]; *In re Lindley*, 29 Cal.2d 709, 722 [177 P.2d 918]; *In re Horowitz*, 33 Cal.2d 534, 537 [203 P.2d 513]). [2] In making such an attack, however, petitioner must establish by a preponderance of the evidence that perjured testimony was adduced at his trial, that representatives of the state knew that it was perjured (*In re Mooney*, *supra*, at p. 15; *In re Lindley*, *supra*, at p. 722), and that such testimony may have affected the outcome of the trial (*Napue* v. *Illinois*, 360 U.S. 264, 272 [79 S.Ct. 1173, 3 L.Ed.2d 1217, 1222-1223]; see *In re De La*

Roi, 27 Cal.2d 354, 365 [164 P.2d 10]; *In re Mitchell*, 35 Cal.2d 849, 856 [221 P.2d 689]).

[3] Petitioner alleges several instances of knowing use of perjured testimony. He first attacks Costello's identification testimony. At the preliminary hearing and at the trial, Costello identified petitioner as the man he chased, but when asked at the reference hearing if petitioner was that man, he testified that "at this time I will have to say no." This change in testimony alone does not constitute perjury, but merely indicates that Costello changed his mind. The pertinent inquiry is whether he testified at the trial contrary to his belief at that time. (See *People* v. *Von Tiedeman*, 120 Cal. 128, 134-137 [52 P. 155].)

[4] More than a year after the trial and several months before the reference hearing, Costello was interviewed by the police. A tape recording of that interview (the accuracy of which was challenged by Costello) disclosed that when asked if he had any doubts about his identification of petitioner at the trial, he answered: "No at that time there was no doubt. . . . I'm not worried about perjury because I don't think I perjured myself. I answered the question to the best of my knowledge and recollection." At the hearing, however, Costello claimed that he always had grave doubts about his identification. The referee found that he "testified of his own free will as to such identification based upon his own knowledge as disclosed by his testimony at both the preliminary examination and the trial of Petitioner in the Superior Court."

At the reference hearing, Costello also testified that he had told the police that he was extremely reluctant to testify because of his doubts, but that they had forced him to testify by holding some bad check charges over him. This charge was categorically denied by the police officers involved although they admitted having knowledge of several outstanding bad checks issued by Costello and of his previous convictions for issuing such checks. The referee found that the record "reflects definitely that no threats of any character were made to Costello with regard to the aforesaid worthless checks." Costello also

testified that he had expressed doubt about his identification, both before and after the trial, to at least 16 state officials, including members of the Los Angeles Police Department, members of the Vernon Police Department, members of the staff of the Los Angeles District Attorney, and two judges of the Superior Court of Los Angeles County. Testimony and affidavits from these persons uniformly denied that Costello expressed such doubts to them. In fact, some of them stated that he seemed quite certain and unshakable in his identification of petitioner. The prosecuting attorney and a police officer testified that they talked to Costello before he testified at the trial to impress upon him the seriousness of his identification and to tell him that there would be no disgrace in withdrawing it if he were unsure. Costello replied: " 'I'm positive. I know it's serious to be wrong. I have been convicted myself of a felony, so I know how serious it is. I'm positive in my identification.' " The referee found "that at no time either before or after the trial of Petitioner Imbler on the charge of murder, which resulted in his conviction, did the witness Alfred Costello express to any representative of the State of California a doubt as to his identification of Petitioner Imbler as testified by the witness Costello."

We adopt both of these findings involving Costello's alleged perjured identification. Although we are not bound by the findings of a referee (*In re Mooney*, 10 Cal.2d 1, 17 [73 P.2d 554], they are entitled to great weight (*In re Riddle*, 57 Cal.2d 848, 853 [22 Cal.Rptr. 472, 372 P.2d 304]; *In re Martinez*, 52 Cal.2d 808, 812 [345 P.2d 449]; *In re Mitchell*, 35 Cal.2d 849, 855 [221 P.2d 689]). After a full hearing, the referee disbelieved most, if not all, of the changes that Costello made in his trial testimony and the charges he made at the reference hearing. He found "that the testimony given by said Alfred J. Costello at the Reference Hearing, which varied from his testimony at the murder trial, was thoroughly impeached and discredited by numerous witnesses, while the testimony of said Alfred J. Costello, as given at the murder trial concerning his identification of Petitioner is

corroborated by the testimony of witnesses Billy Hillen and Alonzo Dunlap, and is consistent with other circumstances in the case. . . ." The referee had the opportunity to observe the witness and judge his credibility and demeanor. (See *In re De LaRoi*, 27 Cal.2d 354, 364 [164 P.2d 10]; *In re Marvich*, 27 Cal.2d 503, 516 [165 P.2d 241].) The transcript of the hearing reveals many ambiguities and inconsistencies in Costello's testimony that convince us that the referee was fully justified in making this finding.

[5] Petitioner alleges that Costello perjured himself when questioned about seeing photographs of petitioner. Costello testified at the reference hearing that petitioner's mug shot was shown to him many times before the lineup where petitioner was identified, and "as I recollect back, there was a little psychology that they used on me by showing me the picture continuously. The image of Imbler, naturally, became imbedded in my mind, and when I saw the man in the lineup, it was a recollection of the picture not of the man that had entered the store. It was a little phychology that they worked." The investigating police officer admitted at the reference hearing that he showed the photograph of petitioner from the Los Angeles Police Department files once to all of the witnesses before the lineup. He presented it with photographs of about a dozen similar-looking men, and each of the witnesses identified petitioner's photograph as that of the killer.

Costello's position on this point is not clear. At the trial, he first stated upon cross-examination that he had not seen any mug shots of petitioner before the lineup; after further questioning, he stated that he was "not positive, but certain" that he had seen mug shots of petitioner in a mug book before the lineup, but that he had kept his identification to himself. At the reference hearing, Costello presented a third version of the facts; he claimed that the police showed mug shots of petitioner to him several times before he helped in making the composite drawing of the killer, which closely resembled petitioner and was admitted into evidence at the trial.

The police denied showing any photographs of petitioner to Costello before the drawing was completed. The composite drawing was completed on January 18, 1961, and the Los Angeles Police Department's files show that petitioner's file, which presumably contained his photograph, was not released to officers investigating the Hasson murder until January 25. Costello testified that some of the mug shots he was shown were taken by the Pomona police when petitioner turned himself in for the January 14 robbery attempt, but the Pomona photographs were not taken until January 17, and the investigating officer from the Los Angeles Police Department testified that he did not receive them until January 20 and never showed them to any of the witnesses. Moreover, it appears that petitioner first came to the attention of the Los Angeles police as a suspect when an officer who had talked to him when he turned himself in for the Pomona robbery saw a resemblance between him and the completed composite drawing. It therefore appears that petitioner's photograph was not shown to Costello before the composite drawing was made.[1]

The referee found that "the witness Alfred J. Costello was not induced by any representative of the State of California to unwittingly or otherwise make a false identification of Petitioner Imbler. . . ." The evidence supports this finding and fails to establish that Costello wilfully gave false testimony at the trial about seeing petitioner's photograph. His testimony at the reference hearing shows that he was confused about when he saw a photograph of petitioner and the form of that photograph. In any event, Costello's testimony at the trial apprised the jury that he may have been "preconditioned" to identify petitioner at the lineup. (Compare *Napue* v. *Illinois*, 360 U.S. 264, 270-271 [79 S.Ct. 1173, 3 L.Ed.2d 1217, 1221-1222].)

[1] An officer of the Vernon Police Department, called by the State to demonstrate Costello's certainty as to his identification, testified that between January 10 and January 15, 1961, Costello told him that he "was able to select one picture of an individual who was the suspect or who did the shooting in this particular case" and that he "was very sure about it." In light of all of the contrary evidence, however, the witness was probably confused as to the date, for he had previously testified that he did not know the date of this conversation because of Costello's frequent visits.

[6a] Petitioner also alleges that several times Costello perjured himself in answering questions involving his credibility. At the trial, Costello was cross-examined about his criminal record and testified that he had only one felony conviction; his "make sheet," introduced at the reference hearing, showed that in fact he had two felony convictions. Costello was also cross-examined about his commitment to state mental hospitals. On redirect examination, he attempted to rehabilitate himself by testifying that since the time of his release from these hospitals, he had received degrees from the University of California (completing a four-year course in two years) and the University of Southern California (receiving an "Engineer's Degree"). This statement was established as false at the reference hearing.

[7] False testimony affecting a witness's credibility is perjured if willfully given (*People* v. *Barry*, 63 Cal. 62, 64-65; *People* v. *Lem You*, 97 Cal. 224, 226-227 [32 P. 11]; *People* v. *Low Ying*, 20 Cal.App.2d 39, 42-43 [66 P.2d 211]),[2] and such testimony would require that the

[2] As to Costello's trial testimony regarding his college education, the referee found "that the foregoing false testimony does not constitute perjury as defined by the Penal Code of the State of California (§§ 118, 125) in that said testimony was not given as to any fact material to the essential issues involved in the trial of Petitioner Imbler." (No finding was made as to Costello's trial testimony regarding the number of his felony convictions.) False testimony concerning the credibility of a witness is material, however, and may be the basis of a conviction for perjury. (*People* v. *Barry, supra; People* v. *Lem You, supra; People* v. *Low Ying, supra.*) Arguably, Costello's educational achievements are technically immaterial to show rehabilitation from insanity, but in a perjury case, "the ordinary test of materiality is whether the testimony given could have probably influenced the tribunal before which the cause was being tried. . . ." (*People* v. *Barry*, 153 Cal.App.2d 193, 209 [314 P.2d 531]; accord *People* v. *Di Giacomo*, 193 Cal.App.2d 688, 699-700 [14 Cal.Rptr. 574]; *People* v. *Macken*, 32 Cal.App.2d 31, 41 [89 P.2d 173]; *People* v. *Dunstan*, 59 Cal.App.574, 584 [211 P. 813].) This testimony "could have probably influenced" the jury to consider Costello rehabilitated after his capacity and competence as a witness had been put into question on cross-examination.

conviction be overturned if representatives of the state had knowledge of its false nature and if it might have affected the outcome of the trial (see *Napue* v. *Illinois*, 360 U.S. 264, 269-270 [79 S.Ct. 1173, 3 L.Ed.2d 1217]; *People* v. *Savvides*, 1 N.Y.2d 554, 557 [154 N.Y.S.2d 885, 136 N.E.2d 853]). [6b] Petitioner, however, failed to prove knowledge of these falsehoods by representatives of the state. No evidence was introduced at the reference hearing to show that any person connected with the prosecution knew of Costello's educational background. The prosecutor examined him about his college degrees on redirect examination only because Costello had informed him that he had several degrees during a recess immediately after the cross-examination. The prosecutor had no reason to disbelieve this information, which was first given to him during the course of the trial, and he had no duty to verify it before using it to rehabilitate his witness. (See *In re Horowitz*, 33 Cal.2d 534, 540 [203 P.2d 513].) Petitioner contends that the prosecutor had Costello's "make sheet," which listed all of his prior convictions, before him at the trial. The referee found, however, that petitioner's counsel had the same "make sheet" in his possession during the trial, yet failed to use it to correct the false testimony. If the prosecutor is to be charged with knowledge of the contents of the "make sheet," so must petitioner. (See *In re Manchester*, 33 Cal.2d 740, 742 [204 P.2d 881); *Taylor* v. *United States*, 229 F.2d 826, 833-834; *Green* v. *United States*, 158 F.Supp. 804, 809; cf. *People* v. *Adamson*, 34 Cal.2d 320, 329 [210 P.2d 13]; *In re Mitchell*, 35 Cal.2d 849, 856 [221 P.2d 689].) [3]

[3] Petitioner also contends that Costello perjured himself on redirect examination when he testified that his commitment to state mental hospitals was "voluntary." It was established at the reference hearing that he was committed under section 1026 of the Penal Code when he was found not guilty of a criminal charge by reason of insanity. Thus, petitioner argues that the commitment was not voluntary, At the trial, however, Costello apparently only meant that he voluntarily pleaded not guilty by reason of insanity. The following question and answer appear in the redirect examination of Costello:

[Footnote continued on page 23]

[8a] Petitioner contends that the testimony given by the police fingerprint expert at the trial was perjured. [9] If any representative of the state connected with the prosecution either gives perjured testimony or knows that other prosecution witnesses have perjured themselves, the writ will issue. It is immaterial that the prosecuting attorney himself did not have knowledge of the perjury. (*Curran* v. *Delaware*, 259 F.2d 707, 713; see *In re De La Roi*, 27 Cal.2d 354 [164 P.2d 10]; *In re De La Roi*, 28 Cal.2d 264 [169 P.2d 363]; *Pyle* v. *Kansas*, 317 U.S. 213 [63 S.Ct. 177, 87 L.Ed. 214]; cf. *In re Mitchell*, 35 Cal.2d 849, 855 [221 P.2d 689]. But see *In re Allen*, 47 Cal.2d 55, 59-60 [301 P.2d 577]. Compare *Brady* v. *Maryland*, 373 U.S. 83, 87-88 [83 S.Ct. 1194, 10 L.Ed.2d 215, 218].)

[8b] The expert testified at the trial that there were two fingerprint fragments on the plastic razor case found in the pocket of the coat dropped by the killer and that neither was sufficiently well defined to be assigned to anyone. At the reference hearing, an expert produced by petitioner testified that there were three fingerprints on the razor case and that although two were too fragmentary to identify, the third could be identified and was definitely not petitioner's. The police expert at the reference hearing at first testified that there were only two fingerprints on the case. Upon examining his photographs of the fingerprints, he corrected himself and stated that there were three. He repeated again that all were insufficient to identify. After being instructed on cross-examination to examine his photographs overnight, how-

[3] [Continued]

"Q. And what were the circumstances of your voluntarily committing yourself?

"A. Well, in '46 and '47 when I was committed to Mendocino, I got in a little trouble with the law and I was represented by the Public Defender's Office at that time, and it was suggested to me that I enter a plea of not reasonably—not guilty by reason of insanity, and I was furnished a copy with the right answers to give the doctors at that time, which caused me to be committed to Mendocino."

ever, he admitted the next day that one could be identified and that it was not petitioner's.

There is certainly an inconsistency in this prosecution witness's testimony at the reference hearing, but it appears that he first came to the conclusion that one of the fingerprints on the razor case could be identified as not being petitioner's during a recess in the hearing itself. There is no indication that he intentionally gave false testimony at the trial as to the number of fingerprints or as to whether they were identifiable. An honest error in expert opinion is not perjury even though further diligence and study might have revealed the error. (See *In re Howell*, 114 Cal. 250, 254 [46 P. 159]; *People* v. *Von Tiedeman*, 120 Cal. 128, 136-137 [52 P. 155]; *In re Lindley*, 29 Cal.2d 709, 723 [177 P.2d 918].)

[10] Petitioner contends, however, that the fingerprint expert was negligent in analyzing the fingerprints and in testifying that they were too fragmentary to identify. He asserts that we should now recognize that the negligent presentation of false testimony is as damaging as the knowing use of perjured testimony and that, therefore, the judgment should be set aside. The issue of the expert's negligence was not presented to the referee; even if we assume, however, that the expert was negligent, his negligence did not deprive petitioner of a fair trial. We have no doubt that negligence of representatives of the state in preparing and presenting a criminal prosecution could in some cases result in a denial of a fair trial. (See *People* v. *Kidd*, 56 Cal.2d 759, 769-770 [16 Cal.Rptr. 793, 366 P.2d 49]; *People* v. *Carter*, 48 Cal.2d 737, 747 [312 P.2d 665]; *United States* v. *Heath*, 147 F.Supp. 877; cf. *Kyle* v. *United States*, 297 F.2d 507, 511; *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 570-571.) Police investigators, however, are not infallible, and it is the basic purpose of the trial to determine whether they were correct in asserting the defendant's guilt. Unless their negligence has obstructed the defendant in challenging the case against him, it is not a ground for collateral attack. The razor case and the fingerprints on it were available to petitioner throughout the trial for his own examination. Moreover, proof that someone else had handled the razor case would not have absolved petitioner or conflicted with the evidence against him. The testimony of the police expert did not interfere with the presentation of petitioner's defense, and had petitioner considered it advantageous to present further fingerprint evidence, he could have done so.

Petitioner contends that in several instances the state suppressed evidence favorable to him. Evidence of suppression of material evidence has usually been considered in connection with a claim that the state knowingly used perjured testimony to secure a conviction. (*In re Mooney*, 10 Cal.2d 1, 15 [73 P.2d 554]; *In re Lindley*, 29 Cal.2d 709, 722 [177 P.2d 918].) [11] Moreover, suppression by the state of material evidence alone deprives a defendant of due process of law. (*In re Razutis*, 35 Cal.2d 532, 535 [219 P.2d 15]; *Brady* v. *Maryland*, 373 U.S. 83, 87 [83 S.Ct. 1194, 10 L.Ed.2d 215, 218], affirming 226 Md. 422, 427 [174 A.2d 167]; *United States ex rel. Almeida* v. *Baldi*, 195 F.2d 815, 820 [33 A.L.R.2d 1407].) [12] Petitioner contends that the police prevented the appearance of one witness favorable to him and "quietly pushed" him out of Los Angeles before the trial. This witness, James Fritz, was standing near Billy Hillen when the killer rushed by, encouraged Hillen and Costello to stop him, and joined Costello in chasing him, but he did not testify at either the preliminary hearing or the trial. The referee found that this contention "is utterly barren of evidentiary support in the record. I find that the record herein demonstrates that unusual diligence was exercised by the representative of the State of California to procure the attendance of Mr. Fritz as a witness at the murder trial of Petitioner Imbler." The police testified that at the time of trial, they were unable to locate Fritz after a thorough search, and no one has yet been able to find him. Moreover, petitioner's assumption that this witness would have been favorable to the defense is doubtful in light of the card introduced at the hearing, signed by Fritz at the police lineup, identifying petitioner as the killer.

[13] Petitioner contends that the police suppressed the fact that a co-employee of petitioner was unable to identify the coat dropped by the killer. This failure to identify the coat was merely one of many fruitless attempts to connect petitioner to the physical evidence in the case. Evidence of these failures would have been merely negative evidence of little probative value and could not have affected the outcome of the case. (See *Palakiko* v. *Harper*, 209 F.2d 75, 95; cf. *United States* ex rel. *Thompson* v. *Dye*, 221 F.2d 763, 769 [concurring opinion].)

[14] Petitioner contends that the state suppressed the fact that investigating police knew that Costello had issued several checks that were returned because of insufficient funds between the killing and the trial. The referee found, however, that "no threats of any character were made to Costello with regard to the aforesaid worthless checks." The evidence at the hearing shows that the police did not consider this information significant; no charges were made because of the issuance of these checks, and none were ever proposed. Neither before nor at the trial did petitioner request discovery of any of the evidence he now claims was suppressed. (See *Brady* v. *Maryland*, 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]; cf. *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563; *Kyle* v. *United States*, 297 F.2d 507.) [15] Although representatives of the state may not suppress substantial material evidence, they are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses.

[16] Petitioner contends that there is new evidence that undermines the proscution's entire case. (See *In re Lindley*, 29 Cal.2d 709, 723 [177 P.2d 918]; *Jones* v. *Kentucky*, 97 F.2d 335, 338; cf. *Durley* v. *Mayo*, 351 U.S. 277, 291 [76 S.Ct. 806, 100 L.Ed. 1178, 1188] [dissent].) Some of this new evidence has already been mentioned: Costello's testimony at the reference hearing that petitioner is not the man he chased and the new expert testimony that a fingerprint found among the personal effects of the killer is not petitioner's. Moreover, Costello cast doubt on the testimony of the prosecution's other witnesses by testifying that one of them was in no position to make an identification when he saw the killer and that the other was intoxicated. Petitioner also presented several witnesses at the reference hearing to corroborate his alibi defenses. Two additional persons testified that petitioner first met Lingo, who was identified as one of the two men involved in the January 4 killing, on January 14; two additional witnesses testified that they accompanied petitioner in making the rounds of various Los Angeles taverns on the night of the killing.

Much of this evidence was thoroughly discredited at the reference hearing. As to Costello's recanting, the referee found "that while the testimony of the witness Alfred J. Costello, given at the Reference Hearing, is '. . . impeached in so many ways as to defy lucid presentation' . . ., his testimony given at Petitioner's trial for murder is supported and corroborated." Thus, Costello charged that Dunlap, the parking lot attendant who identified the killer at the trial, was so intoxicated at the time of the crime that he could not make an identification. This charge was rebutted by Dunlap's employer, who testified that he had never known this witness to drink on the job although he had checked the lot daily for three years, and by a police officer who testified that Dunlap did not appear to have been drinking when questioned on the scene.

All of the witnesses who testified at the reference hearing that they were with petitioner on the night of the killing were shown on cross-examination to be uncertain of the exact date, and some of the witnesses who testified that petitioner first met Lingo on January 14 were impeached through prior inconsistent statements. Moreover, the testimony supporting both of the alibis was merely cumulative to testimony at the trial, for both of petitioner's alibis were corroborated there, although by a close friend who was his accomplice in the January 14 robbery attempt.

In *In re Lindley*, *supra*, 29 Cal.2d 709, which also involved a conviction based entirely upon identification tes-

timony, a new suspect was discovered after the trial and a former autopsy surgeon testified that the victim had died of a heart attack. We held that such new evidence did not justify relief, and the same conclusion must be drawn here. In this case, as in *Lindley*, the new evidence "does not point unerringly to [petitioner's] innocence," but "presents only a conflict with the evidence which was before the jury" and "affords only a basis for speculation or conjecture." (29 Cal.2d at p. 724.)

Nor can a writ of *coram vobis*, which petitioner seeks in the alternative, issue on the basis of this new evidence. [17] The writ of *coram vobis* is essentially identical to the writ of *coram nobis* except that the latter is addressed to the court in which the petitioner was convicted. (*In re Lindley*, 29 Cal.2d 709, 726 [177 P.2d 918].) [18] These writs will be granted only if petitioner can "show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the judgment." (*People* v. *Mendez*, 28 Cal.2d 686, 688 [171 P.2d 425]; accord, *People* v. *Reid*, 195 Cal. 249, 255 [232 P. 457, 36 A.L.R. 1435]; *In re Lindley*, *supra*, at p. 724-726; *People* v. *Tuthill*, 32 Cal.2d 819, 821 [198 P.2d 505].) No such showing his been made.

[19] Petitioner contends that he was denied adequate representation by counsel because of the absence of an effective investigation in his behalf. (Compare *In re Ochse*, 38 Cal.2d 230, 231 [238 P.2d 561]. See generally Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendant*, 47 Minn.L.Rev. 1054.) The services of the Los Angeles Public Defender's investigative staff were available, however, and an investigator worked on the case. At no time during the trial did counsel indicate that additional investigative services were needed or ask for additional time to conduct an investigation. The only support for the claim that the investigation was inadequate was the fact that an investigation after the trial by the Adult Authority and the district attorney's staff turned up additional alibi witnesses that the defense had been unable to find. Whatever may be the scope of the

right to adequate and effective investigation, it does not require that the investigation produce all evidence that can be shown by hindsight to have been available.

[20] Petitioner contends finally that the trial judge erred in informing the jury in response to a juror's question of petitioner's right to an automatic appeal to this court in the event that they should impose a death penalty. The trial court failed to admonish the jury of their sole responsibility for imposing a sentence or to explain to them the nature and scope of this court's review. The jury was informed of the automatic appeal only after consent of both parties had been obtained, however, and this objection was not raised either at the trial or on the appeal.

The order to show cause is discharged and the petition is denied.

Gibson, C. J., Schauer, J., McComb, J., Peters, J., Tobriner, J., and Peek, J., concurred.

Petitioner's application for a rehearing was denied December 30, 1963.

UNITED STATES DISTRICT COURT
C. D. CALIFORNIA

Civ. No. 68-1543-F

PAUL KERN IMBLER, PETITIONER,

v.

WALTER E. CRAVEN, Warden of Folsom State Penitentiary, State of California, RESPONDENT

April 23, 1969.

Habeas corpus proceeding by state prisoner. The United States District Court, Ferguson, J., held that state defendant's right to due process of law was violated, and cumulative effect of errors was not harmless, where prosecution permitted witness to give material testimony which prosecution knew or should have known was false, suppressed an exculpatory fingerprint, and failed to disclose negative evidence indicating that coat, which prosecution claimed was worn by defendant, was not defendant's.

Petition granted conditionally.

* * * *

Roger S. Hanson, Woodland Hills, Cal., for petitioner.
Thomas C. Lynch, Atty. Gen., Thomas S. Kerrigan, Deputy Atty. Gen., Los Angeles, Cal., for respondent.

FERGUSON, District Judge.

Petitioner, a California state prisoner, seeks a writ of habeas corpus under 28 U.S.C. § 2254, challenging the validity of a judgment of conviction in two counts entered in the Superior Court in Los Angeles on August 10, 1961. The first count charged murder in the first degree, for which the jury fixed the penalty at death; in addition, petitioner was sentenced to a term of imprisonment not to exceed ten years on count two, assault with a deadly weapon with intent to commit murder. The

judgment was affirmed by the California Supreme Court on automatic appeal [Calif.Pen.Code § 1239(b)]. People v. Imbler, 57 Cal.2d 711, 21 Cal.Rptr. 568, 371 P.2d 304 (1962). Thereafter, petitioner sought a writ of habeas corpus in the California Supreme Court. The writ was denied on the basis of a referee's findings following an evidentiary hearing. In re Imbler, 60 Cal.2d 554, 35 Cal.Rptr. 293, 387 P.2d 6 (1963), cert. denied, 379 U.S. 908, 85 S.Ct. 196, 13 L.Ed.2d 181 (1964).

Petitioner then filed a second petition for a writ of habeas corpus in the state courts challenging solely the penalty of death. During the penalty phase of petitioner's trial, the prosecution stated to the jury that life imprisonment, because of the possibility of parole, did not necessarily mean permanent incarceration. The trial court instructed the jury that it could consider the possibility of parole after seven years' imprisonment in determining the penalty. Holding these statements and instructions to be improper, the California Supreme Court reversed the judgment imposing the death penalty. In re Imbler, 61 Cal.2d 556, 35 Cal.Rptr. 293, 387 P.2d 6 (1964). On remand, petitioner was sentenced to life imprisonment on the murder count.

The federal petition was originally heard in the Eastern District of California. The District Court there denied the petition, holding it to be premature under McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1931), since petitioner was also serving concurrent sentences under independent convictions not then being challenged. The Court of Appeals for the Ninth Circuit reversed the denial following the United States Supreme Court's overruling of McNally v. Hill, *supra*, in Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). Imbler v. Oliver, 397 F.2d 277 (9th Cir. 1968). Thereafter, the case was transferred to this District pursuant to 28 U.S.C. § 2241(d).

The petition for a writ of habeas corpus is conditionally granted for the reasons set forth herein.

I

[1] A federal evidentiary hearing on petitioner's claims was not held since the same contentions were presented in the writ of habeas corpus before the California Supreme Court. A referee appointed by that court conducted a full and adequate hearing, and since there is no major dispute as to the basic facts, this court need not conduct a further hearing. Townsend v. Sain, 372 U.S. 293, 318, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); Jackson v. California, 336 F.2d 521, 522 (9th Cir. 1964).

The complete reporters' transcripts of petitioner's trial and of the state habeas corpus hearing, as well as the referee's report thereon, are part of the record herein and have been fully considered by this court.

II

About 8:30 on the evening of January 4, 1961, two men entered a Los Angeles grocery store owned by Morris Hasson. Mr. Hasson was, at the time, kneeling behind the counter. His wife, then also in the store, approached the apparent customers; by that time, Mr. Hasson had risen with a peculiar look on his face by which, his wife testified, she knew something was wrong. When she started to question him, she observed a gun barrel protruding from the coat of one of the men. As she asked what the men wanted, the gun was fired, killing Mr. Hasson. The two men walked out of the store and headed in opposite directions, the gunman walking west.

Mrs. Hasson testified that the killer was wearing a hat and coat, and that she did not see his face and could not identify him. She subsequently identified the accomplice as one Leonard Lingo.

There was no physical evidence whatsoever connecting petitioner with the crime. The most significant evidence was the testimony of one Alfred Costello, called by the prosecuting attorney the "People's principal witness".

Mr. Costello testified that about 8:30 in the evening involved he was directly across the street from the Hassons' grocery store when two men in the store, one wearing a dark coat and a "slouched down" hat, attracted his

attention. Costello stated he heard a shot and, as he walked across the street, he attempted to intercept the killer who he then noticed was holding a gun. At this point he was eight to twelve feet from the man, who then made a right-hand turn heading west. Costello identified him as petitioner. Costello testified that he followed the killer about 25 feet into an alley. The killer started to run, losing his hat. He hesitated, then entered a parking lot. Costello then yelled, "Stop or I'll shoot". The killer turned and fired at Costello who, standing 15-20 feet away, heard the bullet pass him and strike against a building. The killer then ran through the parking lot and finally into a third parking lot, Costello still following. Near the attendant's office of that lot, the man discarded his coat, then doubled back through the alley and toward Hasson's store. Costello temporarily lost sight of him, then spotted him again going into a Y.M.C.A. building. Thereafter, Costello returned to the parking lot to recover the coat, and discovered the gun and a razor case in a pocket.

In addition, there was testimony from one Billy Hillen, who was leaving the Hassons' store as the killer and his accomplice were entering it. The men passed within four or five feet of Hillen. Hillen testified that petitioner was one of the men, wearing a brown overcoat and green hat, and that Lingo was the other. When he was about six or seven steps outside the store, Hillen heard a shot and turned back. He stated that petitioner was by that time standing outside of the store as Costello and a man named Fritz approached. Fritz said "jump him", but Hillen, who saw the gun, said to let him go.

The following day, Hillen recovered the hat worn by the killer.

Alonzo Dunlop, the third eyewitness, was an attendant in one of the parking lots through which the killer had run. Dunlop testified that he saw petitioner walk through his lot that night about 8:50 p.m. He said he heard no gunshots, although Costello stated the killer had fired at him in one of the adjacent parking lots. The only unusual sound he testified he did hear was the scream of Mrs. Hasson, and this only after the killer

had left his lot. He further testified that he knew Costello by sight, but had not seen him in the lot that evening.

Ten days later, on January 14, 1961, petitioner, Leonard Lingo and one Jerry Mayes attempted an armed robbery of a service station in Pomona, California. Lingo died as the result of a traffic accident following the attempted robbery and Mayes was captured. Petitioner subsequently surrendered to the Pomona police.

Attempting to solve the Hasson murder case, the Los Angeles police showed Mrs. Hasson photographs of Lingo. She identified Lingo as the man who accompanied the murderer of her husband.

On January 30, 1961, prior to the trial, witnesses Costello, Hillen, Dunlop and Fritz were taken to a lineup. The lineup was conducted in four or five groups, with ten to twelve men in each group. When Hillen saw petitioner in the last group, he stated out loud, in the hearing of the other witnesses, "That's him". Hillen admitted making that statement, Dunlop testified as to it, and Costello also heard such a comment. Petitioner was then identified by the witnesses. Nevertheless, Hillen requested to see him wearing the hat and coat recovered from the vicinity of the murder. Several of the men were required to don the clothes, although there is some dispute as to whether any of them were similar in build to petitioner, and Hillen again identified petitioner.

Petitioner's defense was an alibi. He testified that he and three other persons, along with his girl friend for part of the evening, visited about five drinking or dancing establishments, which he either named or described, from about 5:30 p.m. until after midnight on the day the murder occurred. He was able to identify fully only two of his companions: Jerry Mayes, who also testified about those activities although he found it difficult to be certain about the exact date, and one Robert Mahon. Also in the group were a man petitioner thought was named George, in whose car the group travelled from one place to another, and petitioner's girl friend, Ann, whose last name he could not recall.

In addition, while petitioner admitted to his participation in the Pomona robbery, he denied knowing Lingo before the 14th. He testified, as did Mayes, that the first time he and Mayes met Lingo was in the early morning of the 14th, the introductions having been made by a man named Dale who was not located at the time of trial.

Subsequent to the trial, investigation produced further corroboration by new witnesses both of petitioner's alibi and of his statement with regard to his first meeting with Lingo on January 14, ten days after the murder. The prosecution made these facts known to the Governor's office and the California Adult Authority (the state parole board), stating that "investigation has revealed a consistency in Imbler's position which is now corroborated by others". The man named Dale, who introduced petitioner and Lingo on January 14, had been found, and the owner of the car in which the drinking rounds were made on January 4th, whom petitioner thought was named "George", was also located and corroborated the alibi.

III

Petitioner alleges that prejudicial error occurred during testimony of the witness Costello primarily, but not exclusively, involving that witness' credibility.

One instance of such error is claimed to be in the following testimony:

> "Q [By defense counsel] * * * Did you see any mug shots, as they are called, or small pictures of the defendant that you remember—Mr. Imbler—before you went to a line up?
> "A [By Costello] No.
> "Q Did the officers bring you out and show you a number of pictures?
> "A Well, I looked through the mug books, which is customary, I think.
> "Q You did look through a mug book?
> "A Yes.
> "Q You saw a number of pictures then of different people as possible suspects?
> "A Yes.

"Q And among them were you able to find anybody that caused you to think this might be the person among the mug shots?

"A Yes, but I kept that to myself. I didn't reveal it at that time.

"Q Did you see any mug shots of the defendant particularly?

"A I believe I did."

Thus, in Costello's testimony there appears a possible contradiction as to whether he saw pictures of petitioner prior to the lineup. However, it is possible to interpret the testimony, and the jury may well have so interpreted it, as meaning that Costello did not see any mug shots of petitioner before the lineup, and was shown the "mug book" only after the lineup had already taken place. In fact, both Costello and Hillen were shown photographs of Petitioner on January 25, 1961, five days prior to the lineup. Such pictures were not part of a "mug book", but were shown along with some twelve or so other pictures. At that time, on January 25th, Costello did not keep his identification to himself; rather, both he and Hillen identified Imbler as a "good possible suspect". Therefore, to the extent that Costello answered that he had not been shown pictures of Imbler, or at least did not see them apart from any "mug books", he was not telling the truth. At least one of the police officers involved in the investigation, who knew of petitioner's pictures being shown to the witnesses, was always present in the courtroom during the trial; yet no attempt was made to correct this inaccuracy. Although this court cannot conclude that Costello willfully perjured himself on this issue, it is clear that his answer was false and that the state, having knowledge of such falsity, permitted it to stand.

The witness Hillen similarly testified:

"Q [By defense counsel] * * * Did the officers show you at any time some small pictures of different men to see if you could pick out a man from some pictures?

"A [By Hillen] I looked at the mug books. That's standard procedure."

Again:

"Q * * * [D]id you ever see any pictures of the defendant, if you remember?

"A Not that I remember."

As indicated above, this answer was also false, and the state had knowledge of such falsity.

Further false testimony was given by Costello on matters relating to attempted impeachment of his testimony. In the following testimony on redirect examination, the prosecutor led Costello to testify concerning a previous "voluntary commitment" to a state mental hospital, when in fact the commitment had been mandatory upon a court adjudication of insanity:

"Q [By District Attorney] Did you voluntarily commit yourself in 1946 to any of these state hospitals?

"A [By Costello] Yes, I did.

"Q And what were the circumstances of your voluntarily committing yourself?

"A Well, in '46 and '47 when I was committed to Mendocino, I got in a little trouble with the law and I was represented by the Public Defender's Office at that time, and it was suggested to me that I enter a plea of not reasonably—not guilty by reason of insanity, and I was furnished a copy with the right answers to give the doctors at that time, which caused me to be committed to Mendocino."

Costello denied on the stand that he had been adjudicated insane, although both the prosecutor and defense counsel knew the denial to be false from a "make sheet" each had in his possession. That denial, however, was sticken in order to allow the court to hear legal argument on the propriety of the inquiry. When Costello was subsequently asked if he knew, of his own knowledge, whether the commitment was based upon a finding of insanity, the prosecution's objection was sustained and the witness

was not permitted to answer. The jury had already, however, heard Costello's denial, albeit subsequently stricken.

Thus, the prosecutor, by leading the witness in regard to a *voluntary* commitment, not only introduced erroneous testimony, but also succeeded in preventing the truth from being introduced.

At the state habeas corpus hearing, the prosecuting attorney testified that, so far as he could remember, he did not see the "make sheet" on Costello prior to trial. Just before Costello had taken the stand, the prosecutor had a short conversation with him, at which time Costello told him of the 1951 felony conviction; he did not at that time say anything about hospital commitments. The prosecutor further testified that he saw the "make sheet" for the first time when the public defender showed it to him before cross-examination of the witness. After seeing the "make sheet", he again talked with Costello, confronting him with the new facts. Costello then admitted to various mental hospitalizations, but told the prosecuting attorney that the 1946 admission was a *voluntary* commitment because he [Costello] had voluntarily pleaded innocent by reason of insanity knowing that the result would be hospitalization. Having had before him the "make sheet" that stated that Costello had been "found insane now and at time of crime committed to Mendocino", the prosecutor testified about the discussion with the witness:

> "Mr. Costello told me that he was voluntarily committed. He gave me the reasons why he thought it was a voluntary commitment. Rather than argue with him, I just accepted his own wording by his statement that he pleaded not guilty to—by reason of insanity and was furnished certain answers by the Public Defender. In his mind, he thought it was a voluntary commitment. I wan't going to argue with him. Let him explain it to the jury. The jury could make the decision. That was my attitude."

It therefore appears that the prosecutor in fact knew the commitment had not been voluntary, but, in deference to the witness, he not only refrained from using the term involuntary, but used the opposite and clearly

erroneous term. Thus, whether he intended to do so or not, the prosecuting attorney knowingly created an incorrect impression of the most critical aspect of the commitment.

In addition, during cross-examination defense counsel attempted to elicit testimony of Costello's criminal record.

> "Q [By defense counsel] Mr. Costello, have you ever been convicted of a felony?
> "A [By Costello] Yes, I have. I am glad you asked that question.
> "Q And that was in 1951, was it?
> "A That's right.
> "Q And another one in 1955, is that true?
> "A No. You are wrong.
> "Q Just one felony conviction, 1951?
> "A That's right."

The "make sheet" which the prosecutor saw prior to the cross-examination indicated at least one other felony conviction to which defense counsel referred in the above testimony, and possibly others. However, on redirect examination, rather than correcting the false statement, the prosecutor perpetrated it:

> "Q [By prosecutor] Now, you said that you were convicted of a felony in 1951. What felony was that?
> "A [By Costello] Forgery."

The prosecutor admitted in the state hearing that he did not pursue, in his conversation with Costello prior to redirect examination, the leads suggested by the "make sheet." Thus, while the "make sheet" alone suggested that Costello might be a six-time felon, the prosecution "believed" Costello's statement that he was convicted only once. In summary, Costello's testimony concerning his felony convictions was false, and the prosecutor had information that it was false yet declined to introduce the truth.

On redirect examination of Costello, in an attempt to rehabilitate the witness, the prosecution elicited the fol-

lowing testimony, having previously been advised by Costello of it:

> "Q [By prosecutor] Now, then after your release from any of these hospitals, did you attend any universities or schools?
> "A [By Costello] Yes, I did. I completed two years of my university training—a four year course in two years—and received a degree from the University of California.
> "Q And what type of degree was that?
> "A Industrial relations, and later on I went to night school at SC, and received an Engineer's degree.
> "Q When was it that you received the Engineer's degree?
> "A '54."

Costello further testified that his earnings for the past four years had "averaged around nine to ten thousand a year".

Such testimony was admittedly false. The prosecutor, however, at the state habeas corpus hearing, testified that, at the time of the trial, he did not know it to be false, and, having just been advised by Costello of that information during the recess, did not have sufficient time to verify it.

Petitioner contends that the prosecution *must* have known that this testimony, which it elicited, was false. He further argues that only through gross negligence could the prosecutor have failed to conclude that the testimony was perjured. If in fact the prosecutor did fail to draw that conclusion, petitioner argues that the state should nevertheless be charged with it. It is clear that the state had knowledge during the trial of the following facts about Costello:

> 1. That Costello had at least three previous convictions;
> 2. that in addition to his convictions he had been arrested on forgery and bad check charges on numerous occasions;

> 3. that he was committed to Mendocino State Mental Hospital on an adjudication of insanity in March, 1946;
> 4. that he was recommitted to Mendocino State Mental Hospital in February or March, 1949;
> 5. that he spent time in Camarillo State Mental Hospital in 1947 or 1948;
> 6. that at the time of trial there was a charge pending against him in Highland Park, California, for passing a bad check;
> 7. that at the time of trial there were outstanding checks to Mrs. Hasson and to the hotel at which he was staying for which there were either insufficient funds or no bank account; and
> 8. that he was in prison under a 1951 conviction until November, 1953, although testifying that by 1954, one year after he was released from prison, he had received two degrees from two universities.

With actual knowledge of these facts, or at least having them directly before him, the prosecutor elicited from Costello the testimony that the witness received a university degree in industrial relations, completing a four-year degree in one-half the normal time, and a second full degree in engineering, a totally new and different academic subject, at a university night school within a year after his release from prison.

In addition, Costello was allowed to testify that for the past four years his earnings averaged nine to ten thousand dollars a year, when in fact that prosecution knew that Costello had recently written bad checks for relatively small amounts, of which some were still outstanding and one of which was the basis of a pending criminal proceeding.

The police learned of these facts during their investigation of the case. Moreover, aside from their knowledge or communication thereof to the prosecuting attorney, the existence of the pending charge was also independently known to the prosecuting attorney. During a recess of the trial, he talked to two police officers from Highland Park who said they wanted to speak with Cos-

tello about the charge, and he asked them to wait until Costello was finished with his testimony. The prosecutor's final attempt at rehabilitation came just three questions after he referred to the witness' single admitted prior conviction (although the prosecution knew there had been more than one conviction):

> "Q [By prosecutor] Incidentally, since you have been in trouble with the law have you been trying to straighten yourself out?
> "A [By Costello] Very much so."

This testimony was elicited despite the fact that the prosecutor knew of the pending Highland Park charge, had possession of Costello's "make sheet" which indicated at least two subsequent offenses and a subsequent charge of parole violation, and had available knowledge of or actually knew of the other currently outstanding bad checks.

[2] It is clearly established that a criminal conviction obtained through the prosecution's knowing use of perjured or false evidence violates the defendant's right to due process of law as protected by the Fourteenth Amendment to the federal constitution. Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935). See also, *e.g.*, Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); Naupe v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); Hysler v. Florida, 315 U.S. 411, 62 S.Ct. 688, 86 L.Ed. 932 (1942); Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); Evans v. Eyman, 363 F.2d 540, 542 (9th Cir. 1966).

There is no doubt that false testimony was given at petitioner's trial by Costello in the following respects: as to whether Costello

> (1) saw petitioner's mug shots prior to the lineup,
> (2) was voluntarily or involuntarily committed to Mendocino State Mental Hospital in 1946,
> (3) had previously been convicted of more than one felony,

> (4) attended any universities or obtained any degrees therefrom subsequent to his release from the mental hospitals and from prison,
> (5) earned an average of $10,000 a year for the four years preceding the trial, and
> (6) had been trying to "straighten" himself out since he had been "in trouble with the law".

Further false testimony was given with respect to the mug shots from the witness Hillen.

[3, 4] In order, however, for such false testimony to warrant the relief here sought, it must have been material to the case. The court finds that the six enumerated items of false testimony were in fact material. The first item, relating to Costello's seeing petitioner's picture prior to the lineup, was material to the vital issue of identification. Each of the other items was material to the witness' credibility. It is no longer open to question that such materiality is within the constitutional rule set forth above. The Supreme Court conclusively settled that issue in Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959):

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence * * *."

The Court there cited with approval the following passage from People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854-855:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

See also, Giles v. Maryland, supra 386 U.S. at 74, 87 S.Ct. 793, and Loraine v. United States, 396 F.2d 335 (9th Cir.), cert. denied, 393 U.S. 933, 89 S.Ct. 292, 21 L.Ed.2d 270 (1968). The Court of Appeals in this Circuit has stated:

> "Evidence available for use at the trial may be material within the meaning of this rule, even though it goes only to the credibility of a witness."

Loraine v. United States, supra at 339.

Cases granting relief for failure to make disclosure of evidence or for use of false evidence relating only to credibility are numerous. For example, in Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961), the prosecution successfully objected to the introduction of any evidence of its key witness' mental condition, although it knew the witness had previously been in mental hospitals; that fact was not known to the defense. Such conduct was held to be a violation of the prosecution's duty. In Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966), the court held that the prosecution's apparently unintentional misnaming of its chief witness denied petitioner of a fair trial since it prevented his attorney from discovering the witness' prior criminal record, a matter relating solely to credibility.

See also, United States ex rel. Hill v. Deegan, 268 F. Supp. 580 (S.D.N.Y. 1967), where the key prosecution witness was presented as an honorably discharged veteran who, in addition, was receiving pension as a wounded veteran. This portrait of a good citizen tended to minimize the rather substantial variations that occurred in the witness' testimony. Although at the time the prosecution did not know those facts were false, the court found that the prosecution already had reason to be wary of the witness' testimony. In addition, the prosecution had knowingly allowed certain additional false testimony to be given, which it allowed to stand until the witness himself corrected it. The *Deegan* case is similar to the one here in that the witness was permitted to create for himself a respectable, albeit false, background. Judge Frankel, in granting the petition for a writ of habeas corpus, remarked of the witness, "His gratitous injection

of these unchecked lies adds to the blemishes in an already infested record". 268 F.Supp. at 591. The same may be said in this case. Costello's testimony of his two degrees, his engineering position, and his $10,000 a year job was bound to have some effect in mitigating his less admirable, but factual, past history of which the jury was partially apprised. Thus, although only the witness' credibility was involved (except as to the mug shots), it was in this case extremely significant. It must be remembered that no physical connection between petitioner and the crime was ever established, causing the convictions to rest solely upon witnesses' identification of petitioner.

[5] It is, therefore, readily apparent that the evidence here involved was material within the meaning of the rule. The California Supreme Court also concluded, for example, that Costello's testimony of his college education was material, although the state referee had concluded otherwise. That court stated that on the question of perjury the test of materiality is whether the perjured testimony "could have probably influenced" the trier of facts. The court concluded that, "This testimony 'could have probably influenced' the jury to consider Costello rehabilitated after his capacity and competence as a witness had been put into question on cross-examination". In re Imbler, 60 Cal.2d 554, 564-565 n. 2, 35 Cal. Rptr. 293, 298, 387 P.2d 6, 11 (1963). This test of materiality is consistent with the general law as recognized by the federal courts; that is, whether the false testimony is capable of influencing the trier of facts. See, *e.g.*, Luna v. Beto, 395 F.2d 35, 38 (5th Cir. 1968); United States v. Parker, 244 F.2d 943, 950-951 (7th Cir. 1957), cert. denied, 355 U.S. 836, 78 S. Ct. 61, 2 L.Ed.2d 48 (1957); Blackman v. United States, 108 F.2d 572 (5th Cir. 1940).

Respondent argues that another element of this rule also prevents its application to the instant case: knowledge of the falsity of such evidence on the part of the prosecution. Respondent does not seriously dispute the falsity of Costello's statements. Instead, it is argued that the prosecution, in effect, acted in good faith and without knowledge that such testimony was false. Lacking

such knowledge, the state contends it cannot be responsible for any perjured testimony. This court does not agree.

It should be noted at this point that while it is true that the Supreme Court cases have as yet discussed only the "knowing" use of perjured testimony, there is authority for the proposition that one convicted on the basis of perjured testimony has been deprived of due process even when the prosecution was unaware of the perjury. In Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938), it was held that a state is constitutionally required to provide a corrective remedy upon discovery of the perjury, and, absent such a remedy, federal habeas relief will be granted. There the state courts had held they lacked jurisdiction to grant the relief sought. The prosecutor did not know at the time of the trial that the testimony was false, and there was no suggestion that he should have known. Nevertheless, the United States Court of Appeals granted relief. See also, Smith v. Warden, Maryland Penitentiary, 254 F.Supp. 805 (D. Md. 1966); United States ex rel. Montgomery v. Ragen, 86 F.Supp. 382, 390 (N.D.Ill. 1949).

The position that a criminal conviction founded in part upon perjured testimony cannot be constitutionally permitted to stand whether such perjury is discovered prior or subsequent to trial, is therefore not without authority. The prejudice resulting to a defendant so convicted is not eliminated by the state's ignorance. Nor can it seriously be contended that there is absent any "state action", necessary to invoke the Fourteenth Amendment's protection, in the procuring of a state criminal conviction.

It should also be noted that the Supreme Court has, in its supervisory capacity over the federal courts, held that a new trial is required when it is discovered subsequent to trial that a key government witness in a federal criminal case was not reliable. Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed. 2d 1 (1956). The motion in that case had been made by the government. The Court recognized that ordinarily a defense motion for a new trial alleging new evidence which is "merely cumulative or impeaching" will not afford defendant a new trial.

But in that case, as here, the witness' unreliability is conceded by all parties, and it is not a case of mere cumulative evidence. The Court, in *Mesarosh*, stated:

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.
>
> * * * *
>
> "The government of a strong and free nation does not need convictions based upon such testimony. * * * The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial." [352 U.S. at 9, 14, 77 S.Ct. at 5, 8.]

This rule has been applied in the case of a collateral attack upon a federal conviction (via 28 U.S.C. §2255 motion), Mitchell v. United States, 368 U.S. 439, 82 S.Ct. 462, 7 L.Ed.2d 429 (1962) (per curiam), and the California Supreme Court has been urged to adopt it by at least one justice of that court. People v. Riser, 47 Cal. 2d 566, 593, 305 P.2d 1 (1956) (Carter, J., dissenting), cert. denied, 353 U.S. 930, 77 S.Ct. 721, 1 L.Ed.2d 724 (1957), appeal dismissed, 358 U.S. 646, 79 S.Ct. 537, 3 L.Ed.2d 568 (1959).

It is, however, under *Mesarosh*, still a rule applied only in the Supreme Court's supervisory capacity over federal trials, and despite the Court's statement that "there can be no other just result than to accord petitioners a new trial", the Court has not yet held that a different result would not comport with due process.

[6] Thus, the current law in this Circuit, contrary to the holding in Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938), is that "knowledge" by the prosecution is required to support a claim of denial of due process based upon the existence of prejudicial perjured testimony in a criminal trial. Marcella v. United States, 344 F.2d 876, 880 (9th Cir. 1965), cert. denied, 382 U.S. 1016, 86 S.Ct. 630, 15 L.Ed.2d 531 (1966); Black v. United States, 269 F.2d 38, 43 (9th Cir. 1959), cert. denied, 361 U.S. 938,

80 S.Ct. 379, 4 L.Ed.2d 357 (1960); Taylor v. United States, 221 F.2d 228 (9th Cir. 1955). This court need not consider the propriety of a departure from that rule since it finds the facts in this case to fall within it.

As set forth above, Costello's testimony was materially false in at least six respects. As to his false statement that he was "voluntarily" committed to a certain state hospital in 1946, when in fact he was committed because he had been adjudicated insane, this court finds that the prosecuting attorney had actual and definite knowledge that such statement was false. He not only permitted that statement to stand, an act itself expressly prohibited by Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), but he purposely and intentionally led the witness to make it. Twice in his questioning, the prosecutor himself referred to the commitment as "voluntary", although his testimony at the hearing establishes that he indeed knew better. His justification for using that terminology, to be consistent with the witness' understanding of the situation, finds no basis in the law. Where a prosecutor knowingly permits false evidence to be introduced in a trial and such evidence will inevitably create a false impression in the minds of the jury, no legal justification for that misrepresentation can exist. If the prosecutor wished to avoid for the sake of convenience the term "involuntary", he could have readily done so; there was absolutely no necessity for a substitute adjective, and use of an erroneous one was highly improper. The prosecutor also stated that he intended to let the jury "decide" with respect to the voluntariness of the commitment, having presented to them the "facts". The one fact, however, which he had, and which the jury did not, was that the commitment was not voluntary.

[7] Nor can it be said that there was at least some question about the nature of the commitment, and that the jury, having the "facts", was competent to judge the issue. It is not only affirmative misrepresentations which the prosecutor is prohibited from employing to secure a conviction; omissions and half-truths are equally damaging and prohibited and their use is no less culpable. Jackson v. Wainwright, 390 F.2d 288, 298 (5th Cir. 1968).

Creating an inference that a fact exists when in fact to the knowledge of the prosecution it does not, constitutes the knowing use of false testimony. *E.g.*, Turner v. Ward, 321 F.2d 918-921 (10th Cir. 1963).

"Evidence may be false either because it is perjured, or, though not itself factually inaccurate because it creates a false impression of facts which are known not to be true." Hamric v. Bailey, 386 F.2d 390, 394 (4th Cir. 1967). The court, in *Hamric*, recognized that the witnesses giving false testimony may have innocently done so through a lack of perception. Nevertheless, the state knew such testimony to be false, and failed to bring the true facts to the jury's attention. The conviction was held to violate the Fourteenth Amendment.

[8] The prosecution here also had knowledge of the fact that both Hillen and Costello had seen pictures of petitioner prior to the lineup. Such knowledge is conclusively indicated by the police log. One of the investigating police officers was present at the trial. Even assuming that the prosecuting attorney himself did not have such knowledge, the application of the rule is not precluded, for the prosecution is charged with the knowledge of its agents including the police. This principle is no longer subject to serious dispute. As it was held in Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964):

> "Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor."

The court there held that if the police failed to make proper disclosure, they were participating in the deception. Unlike the situation in Luna v. Beto, 395 F.2d 35, 40 (5th Cir. 1968), which distinguished its facts from those in *Barbee*, an investigating police officer in the case here was present in the courtroom, and was able to hear the testimony given. He could easily have corrected any misstatements of fact, or have brought the same to the

prosecutor's attention. His action is no less that of the state than the actions of a prosecuting attorney. The contention that knowledge of perjured testimony must in fact be "brought home to the prosecuting officers" was expressly rejected in Curran v. Delaware, 259 F.2d 707, 712-713 (3d Cir. 1958), cert. denied, 358 U.S. 948, 79 S.Ct. 355, 3 L.Ed.2d 353 (1959), the court resting its decision upon Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). It is clear that the term "prosecution", for this purpose, includes at least the investigating officers as well as the attorneys. See also United States v. Consolidated Laundries Corp., 291 F.2d 563, 570 (2d Cir. 1961), where even the conduct of government clerks was held to result in denial of due process; Estes v. United States, 254 F.Supp. 314, 318 (W.D.Tex. 1966).

The fact that Costello had been convicted of more than one felony was also known to the prosecuting attorney. He admittedly examined the witness' "make sheet", which indicated *at least* two others. At the state hearing the prosecutor somewhat evasively testified that he had examined the "make sheet", but stated he had looked at it "as a whole", and not to its specific parts. Respondent cannot deny knowledge of facts which it had before it and which its agent admittedly examined. That the agent may have ignored those facts does not relieve the state of its responsibility. This is not mere negligence in failing to ascertain the facts. It is, at best, deliberate failure to take full notice of their significance. Thus, this case is vastly different from Taylor v. United States, 229 F.2d 826 (8th Cir.), cert. denied, 351 U.S. 986, 76 S.Ct. 1055, 100 L.Ed. 1500 (1956), in which petitioner attempted to charge the prosecution with "implied" knowledge of the contents of certain Narcotics Bureau records which allegedly would have refuted what a witness told Narcotics Agents. Here, petitioner need not rely on the mere existence of official records. The facts with which respondent is charged were either in fact known to the prosecuting attorney, the investigating officers, or were contained in documents which the prosecutor had actually examined.

By virtue of the same principles, the prosecution had reason to believe that Costello had not been attempting to "straighten out". Therefore, by asking Costello whether he had been so doing, the prosecutor knowingly attempted to create an impression in the minds of the jurors which he knew was false. For example, as discussed above, the prosecutor personally knew of the pending bad check charge against Costello. In addition, he had examined the witness' "make sheet" which indicated, among other things, two offenses and a parole violation in the period of time involved, and the police officer (who had been present at the trial) knew of additional bad checks issued by Costello that were still outstanding.

The final items of Costello's false testimony are the references to the witness' two alleged university degrees and his claimed annual income. This court has above described the facts known by the prosecutor about Costello. For a man with a history of felony convictions and state mental hospital commitments, such a success story is highly suspect, particularly when coupled with the known fact that Costello had been in prison until November of 1953, and yet he claimed to have received his second degree, through night school, at a university in 1954. This rather incredible story was given in full to the jury as the result of leading questions by the prosecutor.

[9] While the prosecutor claimed not to have disbelieved these outright lies, he clearly had cause to suspect them. The reckless use of highly suspicious false testimony is no less damaging or culpable than the knowing use of false testimony, and a conviction based upon such evidence must suffer the same consequence.

Although there are no cases directly holding that testimony which should have been known to be false falls within the prohibition against the knowing use of perjured evidence, a number of cases have directed their inquiries based upon that principle. Thus, for example, in McCloskey v. Boslow, 349 F.2d 119, 121 (4th Cir 1965), it was held that the allegation that the prosecuting attorney should have known that certain testimony was perjured raises factual issues and "legal questions concerning the state's responsibility for the accuracy of what Dr. Bos-

low said". Again, in Wild v. Oklahoma, 187 F.2d 409, 410 (10th Cir. 1951), the court recognized this principle in finding that:

> "In the case before us there is no suggestion that the prosecuting officers knew or had reason to believe that any of the testimony offered at the trial of the petitioner was false or perjured."

See also Smith v. Warden, Maryland Penitentiary, 254 F.Supp. 805 (D.Md. 1966).

Moreover, in cases where evidence favorable or helpful to the defense has been withheld, due process has consistently been held to be violated even if the evidence is only negligently withheld. That rule was stated in Thomas v. United States, 343 F.2d 49, 53-54 (9th Cir. 1965):

> "The well-recognized rule thus invoked is that a conviction cannot stand where a prosecutor has, either wilfully or negligently, withheld material evidence favorable to the defendant. As the Second Circuit said [in United States v. Zborowski, 271 F.2d 661, 668 (2d Cir. 1959)]:
>
> " 'The prosecutor must be vigilant to see to it that full disclosure in made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried.' "

See also, *e.g.*, Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966); Levin v. Katzenback, 124 U.S.App.D.C. 158, 363 F.2d 287 (1966); Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964); United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961); United States v. Birrell, 276 F.Supp. 798, 817-818 (S.D.N.Y. 1967); United States v. Soblen, 203 F. Supp. 542 (S.D.N.Y. 1961), aff'd, 301 F.2d 236 (2d Cir.), cert. denied, 370 U.S. 944, 82 S.Ct. 1585, 8 L.Ed.2d 810 (1962); United States v. Heath, 147 F.Supp. 877 (D. Hawaii 1957), appeal dismissed, 260 F.2d 623 (9th Cir. 1958) (approving the district court's holding) (the *Birrell* and *Heath* cases involving apparently inadvertent loss of certain documents).

It would hardly be logical, in light of those cases, to hold a prosecutor to a lower degree of diligence with respect to the introduction of false evidence.

[10] Nevertheless this court need not now decide whether mere negligence in allowing this false testimony to be given would warrant the relief here sought. In this case, more than mere negligence has been established. The prosecutor either had reason to believe or in fact knew that each item of evidence discussed above was untrue. The state cannot now disclaim knowledge of such falsity on the ground that its agent, the prosecutor, ignored the facts before him or that the investigating officers failed to disclose those facts to him. Due process of law does not tolerate a prosecutor's selective inattention to such significant facts. It requires that he exercise good faith in prosecuting that case. Such good faith is not fulfilled where the prosecutor allows his witness to give false testimony of which he has advance knowledge and the accuracy of which he has reason to suspect. The duty of good faith is not merely a negative one, to omit from one's case outright lies. It imposes as well an affirmative duty to avoid even unintentional deception and misrepresentation, and in fulfilling that duty the prosecutor must undertake careful study of his case and exercise diligence in its preparation, particularly where he is confronted with facts tending to cast doubt upon his witness' testimony. The prosecutor's objective is justice; his role is not that of a mere advocate. The goal of justice is hardly satisfied by less.

[11] Therefore, as to each of the six items of false testimony described above, the court finds that the prosecutor had knowledge of such falsity, or, if he did not have actual knowledge, that he had reason to believe such testimony was false and his reckless use thereof in disregard of such reason is to be treated the same as knowing use of false testimony.

IV

[12] Respondent's position is that any errors allegedly committed by the prosecution could have been cured by action of defense counsel. Thus, it is argued that if Cos-

tello's testimony, for example, of his university education was suspect, defense counsel should have cross-examined the witness on that issue. It is clear that defendant's public defender should have done so. Nevertheless, his failure to do so will not bar relief. A criminal trial is not a sporting event nor a game of wits. See, *e.g.*, Giles v. Maryland, 386 U.S. 66, 100 87 S. Ct. 793, 810, 17 L. Ed.2d 737 (1967) (Fortas, J., concurring):

> "A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim."

See also Levin v. Katzenback, 124 U.S.App.D.C. 158, 363 F.2d 287, 291 (1966); Curran v. Delaware, 259 F.2d 707, 711 (3d Cir. 1958), cert. denied, 358 U.S. 948, 79 S.Ct. 355, 3 L.Ed.2d 353 (1959).

[13-15] It is true, as respondent urges, that the prosecution is not required to prepare defendant's case. See United States v. Gleason, 265 F.Supp. 880, 884 (S.D.N.Y. 1967). Nevertheless, the failure of defense counsel to conduct an effective Cross-examination, unless a deliberate trial tactic, cannot cure constitutional, prejudicial error committed by the prosecution. The fact that a more diligent counsel might have cured that error does not negate it. See Levin v. Katzenback, 124 U.S.App.D.C. 158, 363 F.2d 287, 291 (1966). See also the concurring opinion of Justice White in Giles v. Maryland, 386 U.S. 66, 82, 87 S.Ct. 793, 801 (1967), wherein he noted that, "Had petitioner's counsel been *less* diligent, the false testimony might rise to the level of a *Napue* violation" (emphasis added). This is not a case such as United States v. Sobell, 142 F.Supp, 515 (S.D.N.Y. 1956), aff'd, 244 F.2d 520 (2d Cir.) cert. denied, 355 U.S. 873, 78 S.Ct. 120, 2 L.Ed.2d 77 (1957), where it may be said that defense counsel's failure to cross-examine a witness with respect to a particular issue was a matter of specific and deliberate strategy for which defendant, upon hindsight, cannot now complain.

V

Petitioner further contends that the prosecution suppressed certain exculpatory fingerprint evidence contained

on a razor case. The case was found in the coat discarded by the killer. At the trial, a police fingerprint expert testified that he found two fragmentary prints on the case, but that they were not sufficient to permit a comparison with any other prints. He stated that there was more than one point of identification in each fragment "constituting possible three or four points", but that at least ten points are needed for an identification. In addition, he agreed with the prosecutor's statement that if he did have a fingerprint exemplar, it would not have done "any good" because he didn't have a sufficient fragment.

After the trial, an expert working on petitioner's behalf discovered a *third* fingerprint on the razor case. The third print was positively identifiable and is admitted not to be petitioner's. All the evidence indicates that this print was in fact on the case at the time of trial.

At the state habeas corpus hearing, the police fingerprint expert was reluctant to admit to the existence of the third print. He first testified that, as he "recalled", there were two fingerprints on the razor case. Upon viewing the case, however, he added, "In my testimony a moment ago I said that there were two. I see that there are three, actually." When asked whether the third print could be identified, he stated that he didn't "believe so". He further testified, after viewing an unmagnified photograph of the print, that he was unable to say whether or not the print was petitioner's. Exemplars of petitioner's prints were then given to him during noon recess at which time he compared them with a *magnified* photo of the third print. His testimony about that second examination was somewhat evasive:

> "Q [By petitioner's counsel] [D]id I show you at noon the prints of Mr. Imbler that were made by Mr. Meyers, I believe it was, the other day?
>
> "A [By police fingerprint expert] Yes, I glanced at them.
>
> "Q Did you look at them and compare them with the photograph of the print appearing on the inside of the razor case?
>
> "A No. I didn't make an accurate comparison.

"Q Did you make enough of an examination to draw a conclusion as to whether or not the magnified photograph is one of the prints appearing on the exhibits that were prepared by Mr. Meyers?

"A I would say that they weren't.

"Q Well, did you make enough of an examination to form an opinion then?

"A That is a more or less casual opinion. As I say, I didn't compare it with a magnifying glass, but I would say that they weren't, generally."

Thus, while the state's expert was unable to make a definite statement with regard to the unmagnified pictures, he was able to conclude, albeit reluctantly, that the print as it appeared in the magnified photo was not petitioner's. After later examining the prints during an overnight recess, he finally made a clear and unqualified statement that the third latent print was not petitioner's.

His testimony raises an additional problem. He stated that the first two latent prints were too fragmentary to be of "any good", even if compared with exemplars. Nevertheless, he did in fact make such comparisons, as admitted in his testimony and shown by police logs of the investigation.

Thus, the function apparently served by fingerprint testimony was to imply to the jury that thep rints on the razor case *might* have been petitioner's. Had the jury known that the third print on the case was not petitioner's, they clearly would have reached a different conclusion with respect to this evidence.

[16, 17] The court finds that evidence of the third fingerprint was suppressed. The referee at the state hearing found, however, that such evidence was equally available to defendant at the trial. The California Supreme Court adopted that conclusion, stating in addition that although in some cases the negligence of one of the state's representatives may result in a denial of a fair trial, in this case it did not. The court stated that "[the police investigators'] negligence has obstructed the defendant in challenging the case against him, it is not a ground for collateral attack", and added that the razor case had been available to petitioner during the trial. In

re Imbler, 60 Cal.2d 554, 567, 35 Cal.Rptr. 293, 387 P.2d 6 (1963). This court respectfully disagrees.

"The suppresssion by the prosecution at the trial, of evidence favorable to an accused violates due process where the evidence is material either as to guilt or punishment, irrespective of the good or bad faith of the prosecution [citations omitted]."

Loraine v. United States, 396 F.2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933, 89 S.Ct. 292 21 L.Ed.2d 270 (1968). See also Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967).

[18] There can be no doubt that had evidence of the third print been deliberately suppressed by the police, even if the prosecuting attorney was not aware of its existence, due process would clearly have been violated. See, for example, Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964), where the police had suppressed the results of fingerprint and ballistics analyses which tended to cast doubt upon whether the gun allegedly used was in fact the murder weapon. The same result follows if the material is negligently suppressed.

As our Court of Appeals has stated in Thomas v. United States, 343 F.2d 49, 53 (9th Cir. 1965):

"[A] conviction cannot stand where a prosecutor has, either willfully or negligently, withheld material evidence favorable to the defendant."

As to negligent suppression, see also the cases cited *supra* p. 808.

VI

Costello testified that as the killer fled he discarded his coat, which Costello later recovered and turned over to police. At the trial, the recovered coat was identified by Mrs. Hasson, as well as by Costello and Hillen as that worn by the killer.

Prior to trial, police exhibited the coat to a fellow worker of petitioner who testified at the state habeas cor-

pus hearing that he had told police he had never seen petitioner wearing such a coat, or anything like it. This evidence, petitioner contends, should have been disclosed to him.

The California Supreme Court stated that this evidence, tending to prove that the coat was not petitioner's, "would have been merely negative evidence of little probative value and could not have affected the outcome of the case". In re Imbler, 60 Cal.2d 554, 568, 35 Cal.Rptr. 293, 301, 387 P.2d 6, 13 (1963).

The state, at oral argument, explicitly conceded that failure of the prosecution to disclose this evidence to the defense was error. The same admission is made by implication in the remarks of the California Supreme Court. However, the state contends that such error was harmless.

[19, 20] The federal harmless error test, to be applied to constitutional errors, requires, as noted below, in order to find such an error harmless, that the court be able to declare it harmless beyond a reasonable doubt. Because no physical connection between the tangible evidence and petitioner was made, and because the jury was prevented from hearing any testimony tending to negate any such connection, although such testimony was available, such a declaration in this case is impossible. To hold otherwise would be to indulge in pure speculation, and would be a clear violation of the federal standards. See, for example, United States ex rel. Hill v. Deeban, 268 F. Supp. 580, 591 (S.D.N.Y. 1967).

The court similarly dispenses with the argument that such evidence concerning the coat was equally available to petitioner. The record in this case nowhere indicates that petitioner even knew of the coat's existence before it was introduced at the trial. If petitioner is in fact innocent, he would not have known there was a coat involved, and it was therefore, for all practical purposes, not available to him. See Lee v. United States, 388 F.2d 737 (9th Cir. 1968).

VII

[21] Petitioner has raised substantial questions concerning his rights at the pre-trial lineup procedure during which he was identified. See, *e.g.*, Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969). However, this court need not rule upon those contentions in light of its decision on the other issues. Moreover, petitioner has failed to exhaust his state remedies on these grounds, and this court therefore declines to consider their merits.

VIII

The harmless error doctrine, as applied to federal constitutional error, is set forth in Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967):

> "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Although the Supreme Court stated it was merely adhering to the test provided in Fahy v. Connecticut, 375 U.S. 85, 86, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963) (whether there was a reasonable possibility that the evidence might have contributed to the conviction) its restatement of the rule in fact appears to be more stringent. It should be noted that *Chapman*, *supra*, was not decided until after the California Supreme Court's adverse determination of petitioner's claims.

[22] The California Supreme Court is without question at the forefront of advancing and protecting the constitutional rights of the accused. Although this court cannot give a state court's conclusions of law as to federal constitutional questions binding effect, Townsend v. Sain, 372 U.S. 293, 318, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), determinations of the California Supreme Court in this field have earned much respect and deserve great weight. Nevertheless, this court must draw independent conclusions of law, and, in light of the United States Supreme Court's recent restatement of the federal harm-

less error rule, it must respectfully disagree with the California court.

[23, 24] The total and cumulative result of all the constitutional errors committed at petitioner's trial prohibits a declaration that, beyond a reasonable doubt, those errors were harmless. This court finds upon review of the record of the entire trial that petitioner was denied a fair trial, and that his federally protected right to due process of law was thereby violated. Even if evidence of petitioner's guilt were overwhelming, the right to a fair trial may not be abrogated. Jackson v. California, 336 F.2d 521, 523 (9th Cir. 1964).

Therefore, this court concludes that the harmless error doctrine does not save petitioner's conviction.

IX

ORDER

It is the order of the court that unless the State of California shall institute proceedings within 60 days from the date this order becomes final to retry the petitioner, a writ of habeas corpus will be granted by this court.

It is further ordered that the court reserves jurisdiction over the parties in regard to this cause.

It is further ordered that the clerk this day shall serve copies of this order by United States mail upon the Attorney General of the State of California, the respondent, petitioner and his counsel, the District Attorney of Los Angeles County, the Honorable Joseph A. Wapner, Presiding Judge of the Superior Court of Los Angeles County, and the Honorable William B. Keene, Presiding Judge of the Criminal Courts Department of the Superior Court of Los Angeles County.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 71-123-RJK

PAUL KERN IMBLER, PLAINTIFF

vs.

RICHARD PACHTMANN, D. W. LIGHTNER, S. MCCALEB, D. SEARS, K. SCARCE, E. GARCIA, DEFENDANTS

FIRST AMENDED COMPLAINT FOR VIOLATION OF CIVIL RIGHTS AND MONEY DAMAGES WITHIN THE MEANING OF TITLE 42, UNITED STATES CODE SECTIONS 1981-1988

COMES NOW, the plaintiff PAUL KERN IMBLER, by and through his attorney ROGER S. HANSON, and complains against the defendants RICHARD PACHTMANN, DE WITT LIGHTNER, SANFORD McCALEB, DONAL H. SEARS, KENNETH SCARCE, and ECTOR A. GARCIA for violations of plaintiff's civil rights, withing the meaning of Title 42, United States Code Sections 1981-1988, inclusive, and the decisions of the United States Court therein interpreting said statutes, including but not limited to that certain decision of the United States Court of Appeals for the Ninth Circuit in *Robichaud* vs. *Ronan*, 351 F.2d 533, October 8, 1965, and that certain decision of the Supreme Court of the United States of America in Jim Garrison to dismiss a civil rights suit brought against him under 42 United States Code Section 1983 on the ground that the said Garrison as a District Attorney enjoyed full immunity. The defendants PACHTMANN, LIGHTNER, McCALEB, SEARS, SCARCE and GARCIA acted individually and at other times collectively and conspiratorially at various times commencing in January of 1961 and continuing thereafter at various times and by their acts of malfeasance, misfeasance, nonfeasance, negligence, and failure to

inform and convict while under a duty to do so, planned and individually and/or collectively acted in concert to deprive plaintiff of his liberty by unlawfully charging him with murder and assault with intent to commit murder, and convicting him of the foregoing, all of which caused plaintiff to be sentenced to death in the lethal gas chamber at the California State Prison at San Quentin, detaining him on Death Row for some four (4) years, and thereafter detaining him of his liberty under a life sentence for the above crimes, while nearly causing his death by lethal gas on two definite occasions. At said times they well and good and truly knew that their acts of deliberate malfeasance, misfeasance, nonfeasance, failure to inform and correct while under a duty so to do were a breach of their duty as Deputy District Attorney in the case of RICHARD PACHTMANN, and as officers of the police department of the City of Los Angeles in the case of the other defendants herein sued under 42 U.S.C. 1981-1988.

Plaintiff brings this suit under Title 42 of the United States Code, Section 1981-1988 inclusive and other relating sections of the United States Code involving the Federal Civil Rights Acts, and the Decisions of the United States District Courts, the United States Circuit Courts, and the Supreme Court of the United States, and the 14th Amendment to the United States Constitution.

Plaintiff PAUL KERN IMBLER herewith incorporates that certain decision of the UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, JUDGE WARREN J. FERGUSON, reported at 298 F. Supp. 795, made final by Order of said Court on or about January 5, 1971, entitled PAUL KERN IMBER vs. OLIVER and the STATE OF CALIFORNIA, 68-1545-F, and the decision of the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT affirming said decision, and the decision of the UNITED STATES SUPREME COURT entered on or about October 16, 1970, denying an attempt to obtain a grant of a Writ of Certiorari filed by the Attorney

General of the State of California, by Albert Harris, Esquire, Deputy Attorney General, as if the same were set forth hereat in haec verba, and the same are herewith plead as part and parcel of the instant complaint for violation of the Civil Rights of the plaintiff PAUL KERN IMBLER.

Because of the acts of the defendants and each of them, this plaintiff has suffered loss of money, loss of consortium of his family, wife, children, and other relatives, loss of freedom for some ten years, has suffered grievous mental cruelty and loss of his opportunity to lead a gainful and fruitful life as a citizen of the United States, all to his damage in the monetary sums to be set forth below in the prayer. Plaintiff has incurred monetary obligations to attorneys in efforts made by said attorneys to secure him his freedom and to correct the illegal acts of the defendants, and each of them, as set forth below in the prayer.

I

At all times mentioned hereinafter, and commencing in January, 1961, the defendant RICHARD PACHTMAN was a duly acting and appointed deputy district attorney of Los Angeles, assigned as Counsel for the People of the State of California, and as an individual and in concert with other defendants hereinafter named, individually and conspiratorially, and with intent, and on other occasions with negligence, acted to deprive plaintiff of a fair and just trial in the Superior Court of the State of California for the County of Los Angeles conducted in 1961 before the Honorable Mark Brandler, then a Judge of said Superior Court, wherein the charge against this plaintiff was murder and assault with intent to commit murder, for which plaintiff was convicted and sentenced to death by lethal gas in the San Quentin Prison Gas Chamber. As set forth in the decision reported at 298 F. Supp. 795, the defendant RICHARD PACHTMAN performed acts of malfeasance, misfeasance, failure to inform and correct, knowingly used testimony at the said trial via witnesses he produced for the people, wherein said testimony, or some of it, was per-

jured, and the said RICHARD PACHTMAN knew of the perjured nature of said testimony and failed to correct and halt the same from being utilized to convict this plaintiff.

During plaintiffs trial as set forth above, defendant RICHARD PACHTMAN was in possession of a "make-sheet", or "rap-sheet" of one Alfred John Costello, a witness called by the prosecution, which showed truly well that said Alfred John Costello was a multi-convicted felon, having been formally sentenced to state facilities for the criminally insane, and the defendant RICHARD PACHTMAN knew that the said Costello has been and had been an inmate of said facilities for the criminally insane by virtue of committing the said Costello therein by order of various Courts of the State of California; that the said Alfred John Costello had been found Not Guilty by Reason of Insanity of Certain Felonies and as a result thereof had been committed to State facilities for the criminally insane at times prior to May of 1951; that the said Alfred John Costello had been continuously an inmate of the California State Prison at San Quentin from May 1951 thru November of 1953; that the said tenure of May 1951 thru November of 1953 was for the crime of Robbery in the First Degree; all of which was known to the said RICHARD PACHTMAN; that at the 1961 trial of this plaintiff as set forth above, the said Alfred John Costello was utilized and called by the said RICHARD PACHTMAN as a witness for the People against this plaintiff, then a defendant, in the case of People of the State of California vs. Paul Kern Imbler, and with the knowledge and the sanction of the said RICHARD PACHTMAN, the said Alfred John Costello did then and thereat testify with falsity and with perjury against this plaintiff, PAUL KERN IMBLER, and said false and perjurious testimony was material in that it made the said Alfred John Costello a more believable witness against the plaintiff and aided in the rehabilitation of the said Alfred John Costello before the jury; and with the knowledge of the fact that said testimony was false, perjurious, misleading and untrue, the said RICHARD PACHTMAN did nothing to correct the same

and acquiesced in same, and the entirety of the same was presented to the jury, and the said RICHARD PACHTMAN did acquiesce in the use of said false and perjurious testimony and aided and abetted in its promulgation while having the power and the duty to correct same, and did the foregoing acts within his capacity as an agent of the County of Los Angeles and also as an individual, and did the same in concert with the defendants DE WITT LIGHTNER and SANFORD McCALEB, both of whom were duly acting police officers of the City of Los Angeles, and the same constitutes a conspiracy to deprive this plaintiff of his civil rights and a fair and just trial within the meaning of the 14th Amendment to the constitution of the United States of America and Title 42 of the United States Code, Section 1981-1988; and the above allegations have been found to be true and correct by the United States District Court at 298 F. Supp. 795 ff.

In particular, the said RICHARD PACHTMAN allowed the said Alfred John Costello to testify falsely in that the said Alfred John Costello was allowed to testify before the jury that the said Alfred John Costello had voluntarily committed himself to mental hospitals when in truth and in fact that said Alfred John Costello had been committed to State Hospitals for the criminally insane as a result of prosecutions of the said Alfred John Costello for felonies in the Superior Court of Los Angeles County in the years 1946-1949 or thereabouts; the said RICHARD PACHTMAN knew well and true that the said Alfred John Costello was intermittantly an inmate of said institutions for the criminally insane during 1946-1951 and in fact had not voluntarily committed himself thereto. The said failure to correct the foregoing material testimony and the knowing use of the foregoing perjured testimony deprived this plaintiff of a fair and just trial within the meaning of the decisions of the United States Supreme Court in *Miller* vs. *Pate*, —— US ——, and the decisions cited in 298 F. supp. 795 by the United States District Court, in that it made the said Alfred John Costello a believable, rehabilitated witness and aided and abetted the State of California to falsely

convict this plaintiff of murder and related crimes, all within the meaning of 42 United States Code, Sections 1981-1988 and the 14th Amendment to the United States Constitution.

As a second overt act, the said RICHARD PACHTMAN allowed the said Alfred John Costello to falsely and perjuriously testify as follows: that the said Alfred John Costello was a graduate of the University of California School of Business, completing a four year bachelors program in two years; that thereafter the said Alfred John Costello matriculated at the College of Engineering of the University of Southern California at Los Angeles, where the said Costello received a degree in Engineering, a totally different academic subject, performing said educational feat in night school, and receiving said second degree in 1954; that at the time the said Alfred John Costello claimed he attended the University of California and the University of Southern California the said RICHARD PACHTMAN knew by way of the "make-sheet" of Alfred John Costello that the said Costello was either within the confines of the State Hospital for the criminally insane or was an inmate at the California State prison at San Quentin for armed robbery in the First Degree, serving at San Quentin continuously from May of 1951 thru November of 1953; that was physically, mathematically, and educationally impossible as shown by the "make-sheet" of the said Alfred John Costello to complete a four-year business program at the University of California followed by a four year engineering degree conducted wholly at "night-school" at the University of Southern California College of Engineering and graduate in 1954 therefrom, while simultaneously being confined within the State Facility for the criminally insane prior to May of 1951, or at the California State Prison at San Quentin from May of 1951 thru November of 1953; that the said RICHARD PACHTMAN utilized and induced said perjured testimony with possession of the said "make-sheet" of said Alfred John Costello in an effort to rehabilitate the said Costello and make the said Costello a believable witness against this plaintiff, PAUL KERN IMBLER; that the testimony ad-

duced by the said RICHARD PACHTMAN from the said Costello was material, false and perjurious and was a deprivation of the Civil Rights of this plaintiff within the 14th Amendment to the United States Constitution and the constitution of the State of California. The said failure to correct the knowing use of perjured testimony deprived this plaintiff of a fair trial within the meaning of the decisions of the United States Supreme Court in *Miller* vs. *Pate*, supra., and the decision of the United States District Court reported at 298 F. Supp. 795, and said testimony was false and material in that it made the described Alfred John Costello a more believable witness against this plaintiff.

In this second overt act, RICHARD PACHTMAN directed Los Angeles Police Officers SANFORD McCALEB and DE WITT LIGHTNER to not disclose the true facts to the attorney for plaintiff, nor did PACHTMAN at any time after plaintiff's conviction attempt to set aside plaintiff's conviction and directed police thereafter to make no revelation of the truth.

As a third overt act, the said RICHARD PACHTMAN, in conspiratorial collaboration with two officers of the Los Angeles Police Department, with the knowledge and help of the defendants SANFORD McCALEB, DE WITT LIGHTNER, who directed the said officers to come to Court, allowed the said Alfred John Costello to testify under oath at the trial of this plaintiff for murder in 1961 that the said Alfred John Costello was now "going straight" and "was having no further trouble with the law", when in truth and in fact the said RICHARD PACHTMAN had requested the said two officers of the Los Angeles Police Department to refrain from arresting the said Alfred John Costello in the Courtroom at plaintiff's trial until he, RICHARD PACHTMAN, concluded using the said Alfred John Costello as a witness against this plaintiff, PAUL KERN IMBLER; that the said Los Angeles Police Officers were present outside the courtroom where this plaintiff was being tried for murder, having been sent there by the codefendants DE WITT LIGHTNER and SANFORD McCALEB, to arrest the said Alfred John Costello for check forgeries and uttering

of false instruments and sending the same into the flow of commerce; that the said police officers advised the said RICHARD PACHTMAN of their purpose, whereupon the said RICHARD PACHTMAN directed the said police officers to withhold the arrest of the said Alfred Costello until he, the said RICHARD PACHTMAN concluded using the said Costello as a witness against this plaintiff, PAUL KERN IMBLER, all within the meaning of *Robichaud* vs. *Ronan*, 351 F. 2d 533; that immediately thereafter the said RICHARD PACHTMAN induced Alfred John Costello to testify falsely and perjuriously that the said Costello had "had no further trouble with the law" since the said Costello had concluded his confinement in the state facility for the criminally insane, while in truth and in fact, the said PACHTMAN knew of the impending arrest for false utterances of checks, and directed Los Angeles Police to not arrest Costello, and knew of the conviction and sentence of the said Costello to the State Prison at San Quentin from May of 1951 thru November of 1953. The foregoing constituted a conspiracy on the part of the said RICHARD PACHTMAN and the Los Angeles Police Department and constituted the said PACHTMAN acting in the role of a policeman and a director of police activity within the meaning of *Robichaud* vs. *Ronan*, 351 F. 2d 533, and knowingly deprived this plaintiff of his constitutional rights to a fair and just trial before the Superior Court of Los Angeles County, as interpreted and found by this Court in 298 F. Supp. 795.

As additional overt acts, the said RICHARD PACHTMAN suffered false and perjurious testimony to be elicited from the said Alfred J. Costello concerning the viewing of pre-trial photographs of this plaintiff, as set forth in 298 F. Supp. 795; the same may be said concerning the prosecution witness Billy Hillen, and the said PACHTMAN knowingly used false testimony therein in concert with the Los Angeles Police, and in particular the co-defendants SANFORD McCALEB and DE WITT LIGHTNER, who were present in the Courtroom during the trial of this plaintiff and failed to correct the false, material, and perjurious testimony adduced from the witnesses Billy Hillen and Alfred John Costello, and the same allegations have already been found to be true by the United States District Court in 298 F. Supp. 795 ff. The foregoing acts of the defendants RICHARD PACHTMAN, SANFORD McCALEB, DE WITT LIGHTNER, and two other Los Angeles Police Officers constitute a conspiracy to deprive this plaintiff of his rights under the 14th Amendment, a violation of Title 42 of the United States Code, and were done by said defendants with knowledge of the perjury, with PACHTMAN acting in the role of a police officer, and the same defendants failed to correct same, while being under a sworn duty to so do. In addition, the said SANFORD McCALEB and DE WITT LIGHTNER possessed personal knowledge of the false check uttering activities of the said Alfred Costello, having personal knowledge that the said Costello had passed phony checks to Mrs. Hasson, wife that survived the alleged murder of the decedent in this case, and the same Costello was under investigation for same, and the defendants LIGHTNER and McCALEB failed to correct these perjurious lies.

In addition, other overt acts as set forth in 298 F. Supp. 795 were engaged in by the said RICHARD PACHTMAN, and served to deprive this plaintiff of his rights to a fair and just trial.

At all times during the said trial, and at times during the pre-trial investigatory phase thereof, the said RICHARD PACHTMAN, directing police officers in traditionally exclusive police activity, was aided by officers doing acts within their agency for the Los Angeles Police Department, defendants SANFORD McCALEB and DE WITT LIGHTNER, and the same knew of the foregoing material facts concerning the said Alfred J. Costello, and the same police officers McCALEB and LIGHTNER were at various times present in the Courtroom and acquiesced in the knowing use of perjured testimony, and the same relationship between defendants PACHTMAN, LIGHTNER and McCALEB constituted a plan and conspiracy to deprive this plaintiff of his rights to a fair and just trial within the meaning of the 14th Amendment to the United States Constitution.

1. The said RICHARD PACHTMAN, in acting as a police officer and directing police officer is not immune from suit under 42 United States Code, Section 1983, within the meaning of the decision of the Supreme Court in *Monroe* vs. *Pape*, 365 U.S. 167 (1961), and

2. The said RICHARD PACHTMAN is not immune from suit as a District Attorney within the meaning of 42 United States Code, Section 1983 because the said RICHARD PACHTMAN has already been found guilty by the United Sates District Court for the Central District of California, Honorable Warren J. Ferguson, 298 F. Supp. 795, the Federal authority allows a 42 United States Code, Section 1983 law suit where there is not risk of harassing the said RICHARD PACHTMAN, who has already been found guilty, within the meaning of *Gregoire* vs. *Biddle*, 177 F. 2d 579, 581, C.C.A. 2d. Circuit, per Honorable Learned Hand, who stated, regarding an alleged "quasi-judicial immunity" of a prosecuting attorney"

> "It does indeed go without saying that an official, *who is in fact guilty* of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and *if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery.*'
>
> 'The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried (as it has been here tried by Judge Warren J. Ferguson), and that to submit all officials, the innocent as well as the *guilty*, to the burden of a trial and to the inevitable *danger* of its outcome, would dampen the ardon of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hardput to satisfy a jury of his good faith."

and

3. The said RICHARD PACHTMAN can not seek dismissal of the complaint under 42 United States Code, Section 1983 under alleged district attorney immunity in view of the decisions of the United States Supreme Court in *Jim Garrison, District Attorney of Orleans Parish, New Orleans, Louisiana* vs. *Chief Judge John R. Brown* of the United States Court of Appeals 5th Circuit, March 20, 1972, which denied a motion to compel dismissal within the meaning of 42 United States Code, Section 1983, the meaning of 28 United States Code, Section 1651, and the meaning of the Interlocutory Appeals Act, 28 USC 1292(b), on a certified question:

> "May plaintiff (CLAY SHAW) maintain this action against the defendant District Attorney (JIM GARRISON) for the Parish of Orleans, who acted on the approval of a three-judge court and a grand jury indictment, in prosecuting plaintiff for a New Orleans-based conspiracy to assassinate the President of the United States, and against those lay citizens who are alleged to have acted with the District Attorney in furthering his investigation of the assassination solely by furnishing funds to him for that purpose?"

Plaintiff incorporates by reference those orders and documents in *Garrison* vs. *Brown*, herewith as Exhibit "A" to this Complaint.

For each of the foregoing three reasons and allegations, plaintiff PAUL KERN IMBLER does sue and does maintain this suit under 42 United States Code, Section 1983 against District Attorney defendant RICHARD PACHTMAN in his role as District Attorney, and as his role as a police officer, director of police officers, and as a District Attorney who has already been found to have violated plaintiff, PAUL KERN IMBLER's civil rights by this Court at 298 F. Supp. 795, and this suit is therefore maintainable under Federal Authority, *Gregoire* vs. *Biddle*, 177 F. 2d 579, Cert. denied, 399 U.S. 949.

The findings of 298 F. Supp. are binding, having been affirmed by the 9th Circuit and certiorari denied by the Supreme Court of the United States in October, 1970.

II

At all times herein mentioned, the defendant DONAL H. SEARS was a duly qualified expert in the field of fingerprint identification and an agent of the police department of the City of Los Angeles, and did investigatory work at the trial and prior thereto of this plaintiff, and thereafter at an evidentiary hearing before the Honorable Thomas White, Justice of the State Supreme Court; the said SEARS testified under oath that there existed certain fingerprint evidence taken from a Gillete safety razor case, and a revolver; that said fingerprint evidence was too fragmentary to ascribe to anyone; that there were three to four points of similarity and identification in existence, but such was de minimis and could not serve to identify the owner of said prints; such testimony was wilfully false; the true facts were that there existed certain complete fingerprints not those of this plaintiff and those facts were suppressed at the trial of this plaintiff, and were suppressed at the evidentiary hearing held before Justice White, until upon cross examination the said defendant SEARS admitted the true status of the fingerprints; plaintiff had had investigators search out the true facts during his stay on DEATH ROW, and the same were finally made known although wilfully suppressed by the representatives of Los Angeles County and the People of California, and the same constitutes the knowing use of perjured testimony, and a deprivation of the rights of this plaintiff, and plaintiff herewith incorporates the findings of 298 F. Supp. 795; in this allegation, the defendant SANFORD McCALEB and DE WITT LIGHTNER had personal knowledge of the true status of the fingerprint evidence, having made periodic checks of additional possible suspects suing the prints cleaned from the razor case, as set forth in 298 F. Supp. 795; at all times during the period in question, the defendant McCALEB and LIGHTNER and

SEARS conspired and acted to deprive this plaintiff of a fair and just trial, and led to his illegal and unlawful conviction of murder and sentence to death, and a resulting 10 year confinement in California Penal Institutions for crimes he did not commit; the said action of the foregoing defendants is chargeable under federal law to the defendant RICHARD PACHTMAN, as set forth in 298 F. Supp. 795, affirmed by the 9th Circuit, cert. denied, USS Ct.

The defendant DONAL H. SEARS personally conducted each and every portion of fingerprint identification, lifts, latents, and rolled printing of this plaintiff PAUL KERN IMBLER, or ordered or supervised the same. The defendant DONAL H. SEARS obtained and lifted a complete print off the Gillette Safety Razor case found within the coat of the killer left near the scene of the crime, and the same print so lifted was not fragmentary as testified to by the said DONAL H. SEARS, but was so complete that the said print had enough information to provide at least 10 to 12 points of comparison to compare to the available rolled fingerprints of PAUL KERN IMBLER and which allowed the said DONAL H. SEARS to definitely rule and know in his own mind that the latent print available was definitely NOT that of PAUL KERN IMBLER. The said complete print was found by the said DONAL H. SEARS at sometime PRIOR to the trial of the plaintiff PAUL KERN IMBLER, and it was known by the defendant DONAL H. SEARS that the complete latent print was not that of PAUL KERN IMBLER *before* the said DONAL H. SEARS took the witness stand and testified at the original trial of this plaintiff for murder in 1961 in the Court of the Honorable Mark Brandler. Further, not only did the said DONAL H. SEARS know and have possession of the said print in his investigation before the original trial in 1961, but the said DONAL H. SEARS caused a photograph to be made of the said latent print, and the said latent print was used to compare with known rolled exemplars of this plaintiff and others who were suspected of the murder, and indeed, enlarged photographs were made of the said latent print, and were

available before plaintiffs trial, and the same were preserved and finally made known at the evidentiary hearing before the late Thomas White, Justice of the Supreme Court of California, in 1962-1963 and related proceedings. The said defendant DONAL H. SEARS had full knowledge of the complete print with at least 10 to 12 possible points of comparison at the time before the said DONAL H. SEARS testified at the trial of this plaintiff, and continued to have possession of said print and the truth thereof, and finally before the said Justice Thomas White admitted that the complete print was not that of PAUL KERN IMBLER, although the said DONAL H. SEARS refused and reluctantly refrained from so admitting until he was pressed to do so at cross-examination at the evidentiary hearing before Justice Thomas White. The said complete print was in existence before the trial of petitioner, was preserved via enlarged photographs, was suppressed at trial and was finally admitted to be in existence by the defendant DONAL H. SEARS in his testimony before the late Justice Thomas White of the Supreme Court of California at the evidentiary hearing held in 1962-1963 and related proceedings. The full and complete latent print was found by the defendant DONAL H. SEARS and was known to the said DONAL H. SEARS during January, February, March and continuously up to and including the trial of this plaintiff in June of 1961, and the said complete prints and portions thereof were used by DONAL H. SEARS and the defendants SANFORD McCALEB and DE WITT LIGHTNER to compare with others who were suspected of the murder of Morris Hasson.

The knowingly and wilfully suppression of the foregoing fingerprints by the defendant DONAL H. SEARS, the photographs of same, and the use of the same for comparison purposes, which ruled out PAUL KERN IMBLER as the owner of said print, were a wilfull suppression of evidence material to the defendant DONAL H. SEARS, the defendant STANFORD McCALEB, the defendant RICHARD PACHTMAN, and the defendant DE WITT LIGHTNER, and constituted a criminal conspiracy to deprive this plaintiff of his civil rights within

the meaning of Title 42, Sections 1981-1988 of the United States Code.

Plaintiff incorporates by reference Amendment To Paragraph II Page 10-11 of Complaint; Response To Request For More Definite and Certain Allegations herewith as Exhibit "B" to this Complaint.

III

At all times herein mentioned, the defendant KENNETH W. SCARCE was a duly acting representative of the County of Los Angeles and the Police Department of the City of Los Angeles, and held himself out to be a duly qualified polygraph operator; the police department of Los Angeles in concert with the Office of the Los Angeles District Attorney subjected this plaintiff to a lie detector test which showed that this defendant was innocent of the crimes herein mentioned; while said information was and is inadmissible in a criminal trial, the said defendant RICHARD PACHTMAN, KENNETH SCARCE, SANFORD McCALEB and DE WITT LIGHTNER, individually and in concert, nonetheless proceeded to bring this defendant to trial knowing good and well that this defendant was innocent of the foregoing crimes by virtue of lie detector tests; that at the foregoing evidentiary hearing before Justice White, the representatives of the people admitted that they definitely knew that this plaintiff had not wielded the murder weapon, although all contentions of witnesses of the prosecution was that indeed this plaintiff had so wielded the murder weapon; the defendant KENNETH SCARCE knowing full well that plaintiff was innocent, did nothing to rectify said miscarriage of justice until the said SCARCE was produced as a witness to testify before Justice Thomas White of the Supreme Court of California at an evidentiary hearing ordered in 1962-1963, whereupon the said SCARCE admitted that this plaintiff was not the killer, and that the lie detector studies so proved that this plaintiff was not the killer.

IV

At all times herein mentioned, the defendant ECTOR A. GARCIA was a duly employed officer of the Los Angeles Police and an expert in sketching of suspects from verbal descriptions furnished by eye-witnesses, and did sketch a portrait of the killer of Morris Hasson, deceased herein; subsequently to the initial sketches which depicted someone other than this plaintiff, this plaintiff was designated as a defendant, wherein the said ECTOR GARCIA altered the sketch that was heretofore made to correspond more closely to this plaintiff; said acts were done individually and in collaboration with defendants McCALEB, LIGHTNER and PACHTMAN, and served to deprive this defendant of a fair and just trial; said sketch was used to aid in convicting this defendant; the above constitutes a conspiracy to deprive this plaintiff of his rights to a fair and just trial and resulted in a 10 year incarceration that is illegal and unlawful and deprived this plaintiff of his just rights as an American citizen.

V

At all times herein, the defendants SEARS, LIGHTNER, McCALEB and GARCIA were the agents of the Chief of Police of the City of Los Angeles, the late WILLIAM PARKER, and currently under the control of Chief of Police EDWARD DAVIS. The chief of Police of the City of Los Angeles is responsible for the acts of his agent officers, and the said chief of police acted to deprive this plaintiff of a fair and just trial and resulted in his illegal conviction and confinement for 10 years in state prisons.

VI

The defendant SANFORD RICHARD McCALEB and DE WITT CLINTON LIGHTNER were at all times duly acting officers of the City of Los Angeles Police Department, and performed pre-trial, during trial, and past trial investigatory activity, and gave their results to defendant RICHARD PACHTMAN, and/or negligently or wilfully failed to disclose certain other matters of defendant RICHARD PACHTMAN; defendants LIGHT-

NER and McCALEB performed extensive pre-trial interviews of witnesses, conspired to hold and perform illegal "line-ups" or "show-ups" involving this defendant in an effort to influence the testimony at trial of alledged witnesses Alfred Senon Costello, aka, Alfred J. Costello, Billy Hillen, Alonzo Dunlap, and James Fritz, within the meaning of the decision of the Supreme Court of the United States in *Stovall* vs. *Denno*, in that they forced plaintiff to don the overcoat worn by the killer, nodded and gesticulated in an identifying manner toward plaintiff when Costello, Hillen, Dunlap, and Fritz failed to identify plaintiff, placed all witnesses together at the time of the show-up, illegally sequestered plaintiff in a small 4 man line-up wearing the coat of the killer, and otherwise performed illegally held and constituted "suggestive" line-ups and show-ups in order to cause and make able the witnesses Costello, Hillen, Dunlap, and Fritz to identify this plaintiff at trial. All of the foregoing were deprivations of Due Process of Law within the 14th Amendment to the Constitution of the United States and are actionable within the meaning of 42 United States Code, Section 1983 and within the meaning of the decision of the United States Supreme Court in *Monroe* vs. *Pape*, 365 U.S. 167 as further overt acts, the defendants DE WITT LIGHTNER and SANFORD RICHARD McCALEB performed the following and further either failed wilfully or negligently failed to correct same when testified to by other prosecution witnesses Costello, Hillen, and Dunlap:

1. On or about January 5, 1961, defendants McCALEB and LIGHTNER participated in lifting finger prints from the razor case and interviewed witness Costello.
2. On or about January 7, 1961, defendants McCALEB and LIGHTNER interviewed witnesses Dunlap and Fritz.
3. On or about January 8, 1961, defendants McCALEB and LIGHTNER interviewed witness Hillen, who at said time was shown mugbooks.
4. On or about January 9, 1961 defendants McCALEB and LIGHTNER supplied photos to and conferred with defendant ECTOR GARCIO regarding drawing a composite of the killer.

5. On or about January 10, 1961, and January 11, 1961 defendants McCALEB, LIGHTNER and GARCIA perpetrated an initial composite of the killer with the aid of witness Hillen,

6. On or about January 12, 1961, defendants LIGHTNER and McCALEB met with witness Costello to alter said composite drawing done by defendant Garcia.

8. On or about January 13, 1961, defendants LIGHTNER and McCALEB met again with witnesses Costello and Hillen to further alter defendant GARCIA'S drawing.

8. On or about January 17, 1961, after plaintiff was confined in Pomona, defendants LIGHTNER and McCALEB met with unknown "witnesses" to again alter defendant GARCIA'S sketch of the killer.

9. On or about January 18, 1961, defendants GARCIA, McCALEB and SEARS again altered the sketch of defendant GARCIA.

10. On or about January 25, 1961, defendants McCALEB and LIGHTNER interviewed witness Hillen and showed witness Hillen photos of plaintiff.

11. On or about January 25, 1961, defendant McCALEB and LIGHTNER caused latent finger prints to be taken of plaintiff.

12. On or about January 25, 1961, witnesses Costello and Dunlap were shown photos of plaintiff by defendants McCALEB and LIGHTNER.

13. On or about January 30, 1961, defendants McCALEB and LIGHTNER rigged an unconstitutional lineup for witnesses Costello, Hillen, Dunlap and Fritz, and because witness Hillen was not "positive" of the identification, said defendants rigged a small suggestive lineup wherein plaintiff was required to don clothes worn by the killer; during said lineups, defendants McCALEB and LIGHTNER made suggestive mannerisms and nods of the head when plaintiff appeared for viewing, and the same was made in order to enable witnesses Dunlap, Costello, Fritz and Hillen to identify plaintiff after each had been shown preline-up photographs of plaintiff prior to January 30, 1961.

14. On or about February 1, 1961, defendants SCARCE, McCALEB and LIGHTNER planned the lie detector test for plaintiff.

15. On or about June 5, 1961, defendants McCALEB, LIGHTNER and PACHTMAN conferred with intent to plan trial of plaintiff.

16. On or about June 16, 1961, defendants McCALEB and LIGHTNER conferred with the Highland Park and Hollywood detectives regarding the check forgery activities of witness Alfred John Costello.

17. On or about June 19, 1961, defendants PACHTMAN, McCALEB and LIGHTNER conferred wherein they discussed witnesses, showing of photos to witnesses, and illegally held line-ups; at said time, all results of investigations were explained to defendant PACHTMAN by defendants McCALEB and LIGHTNER, or defendants McCALEB and LIGHTNER either wilfully or negligently concealed from defendant PACHTMAN the results of their investigations.

18. On or about June 21, 1961, defendants McCALEB and LIGHTNER conferred with defendant SEARS regarding latent finger prints on the Gillette Safety Razor case.

19. On or about June 22, 1961 defendants McCALEB and LIGHTNER with defendant SEARS made fingerprint comparisons of latent prints with those of Leroy Leonard Lingo, Mayes and Mahon.

20. On or about July 5, 1961 defendants McCALEB and LIGHTNER and PACHTMAN met and conspired to plot against plaintiff at his trial.

21. On or about July 6th thru July 13th, 1961, defendants McCALEB, LIGHTNER, and PACHTMAN conducted plaintiff's trial.

As to the foregoing 21 overt acts, defendants PACHTMAN, McCALEB and LIGHTNER knew of each and everyone of their occurrences; at trial, testimony was fraudulently and intentionally adduced by defendant PACHTMAN which defendants McCALEB and LIGHTNER willfully failed to correct; defendants McCALEB and LIGHTNER arranged for the arrest of Costello at the Courtroom of Judge Brandler and in accord with the

orders of defendant PACHTMAN, within the meaning of *Robichaud* vs. *Ronan*, 351 F. 2d. 533, ceased to have the said Costello arrested for forgery until the said Costello concluded testifying against plaintiff; all of said defendants knew of said Costello's illegal activities and concealed same from the jury, positively inducing the said Costello to lie about his current background and overtly failing to correct said testimony when it was present to the jury.

The foregoing deprivations of Due Process of law have been found to be true by the United States District Court for the Central District of California at 298 F. Supp. 795 FF, which plaintiff herewith incorporates by reference.

VII

Taken as a whole and individually, the foregoing defendants and each of them acted in violation of rights guaranteed by the Civil Rights Act of this nation, the United States Constitution, and the laws of this Country as determined by the foregoing Federal Courts, and as more particularly found in 298 F. Supp. 795, *Imbler* vs. *Oliver*, incorporated within this complaint by reference.

WHEREFORE, plaintiff prays judgment against the defendants and each of them, because of his mental cruelty suffered, his loss of consortium for 10 years, his confinement for 10 years, his constant fear of execution by lethal gas at the hands of the representatives of this state, his loss of employment opportunities and his general well being and right to live as a United States citizen as a free man as follows:

1. Against each defendant and his principal in the sum of $1,200,000.00 (ONE MILLION, TWO HUNDRED THOUSAND DOLLARS) exemplary damages suffered;

2. Against each defendant and his principal in the sum of $1,500,000.00 (ONE MILLION, FIVE HUNDRED THOUSAND DOLLARS) actual damages suffered);

3. Attorneys fees in the sum of $15,000.00 (FIFTEEN THOUSAND DOLLARS).

DATED: April 17, 1972.

/s/ Roger S. Hanson,
Attorney for Plaintiff
Paul Kern Imbler

EXHIBIT "A"

Plaintiff incorporates as if the same were fully set forth herein, all orders and documents before the United States Court of Appeals, 5th Circuit, in the matter of *Jim Garrison, District Attorney of Orleans Parish, New Orleans, Louisiana* vs. *Chief Judge John R. Brown,* as this Exhibit.

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Misc. No. 2281

JIM GARRISON, ET AL, PETITIONERS

versus

CLAY L. SHAW, RESPONDENT

On Application for Leave to Appeal from an Interlocutory Order

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Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Eastern District of Louisiana entered on December 1, 1971, in the above styled and numbered cause, is hereby denied.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Civil Action No. 70-466

Section "B"

CLAY L. SHAW

versus

JIM GARRISON, et al.

ORDER OF CERTIFICATION
UNDER INTERLOCUTORY APPEALS ACT

This matter came on for hearing on November 10, 1971, on motions of defendants JIM GARRISON, WILLARD E. ROBERTSON, JOSEPH M. RAULT, JR., CECIL M. SHILSTONE and PERRY RAYMOND RUSSO, to amend this Court's order entered on November 1, 1971, denying defendants' motions to dismiss the complaint for failure to state a claim upon which relief can be granted, to include in its order an appropriate certification pursuant to 28 USC 1292(b). The Court, having heard the arguments of counsel and having studied the memorandum submitted by plaintiff, is now fully advised in the premises and ready to rule. Accordingly,

IT IS ORDERED that this Court's order, entered herein on November 1, 1971, denying defendants' motions to dismiss the complaint in the above-entitled and numbered action for failure to state a claim upon which relief can be granted, be, and it is hereby, amended to read as follows:

"IT IS THE ORDER OF THE COURT that the motions of defendants, Joseph M. Rault, Jr., Willard E. Robertson, Jim Garrison, Cecil M. Shilstone and Perry R. Russo, to dismiss, be, and the same are hereby, DENIED; but this Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation."

NEW ORLEANS, Louisiana, November 30, 1971.

/s/ Frederick J. H. Heebe
United States Judge

Roger S. Hanson
6265 Lubao Avenue
Woodland Hills, California
218-883-5365
Attorney for Paul Imbler

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 71-123-RJK

PAUL KERN IMBELER, PLAINTIFF

v.

RICHARD PACHTMANN, ET AL., DEFENDANTS

AMENDMENT TO PARAGRAPH II PAGE 10-11 OF COMPLAINT; RESPONSE TO REQUEST FOR SOME DEFINITE AND CERTAIN ALLEGATIONS

COMES now the Plaintiff Paul Kern Imber, and adds, amends, and makes more certain Paragraph II of the Complaint now on file and alleges as follows:

II

Plaintiff incorporates each and every allegation heretofore set forth in said paragraph II, pages 10 and 11 of the original complaint, and in addition asserts as follows:

The defendant Donal H. Sears personally conducted each and every portion of fingerprint identification, lifts, latents, and rolled printing of this plaintiff Paul Kern Imbler, or ordered or supervised the same. The defendant Donal H. Sears obtained and lifted a complete print off the Gillette Safety Razor case found within the Coat of the killer left near the scene of the crime, and the same print so lifted was not fragmentary as testified to by the said Donal H. Sears, but was so complete that the said print had enough information to provide at least 10 to

12 points of comparison to compare to the available rolled fingerprints of Paul Kern Imbler and which allowed the said Donal H. Sears to definitely rule and know in his own mind that the latent print available was definitely NOT that of Paul Kern Imbler. The said complete print was found by the said Donal H. Sears at sometime PRIOR to the trial of the plaintiff Paul Kern Imbler, and it was known by the defendant Donal H. Sears that the complete latent print was not that of Paul Kern Imbler BEFORE the said Donal H. Sears took the witness stand and testified at the original trial of this plaintiff for murder in 1961 in the Court of the Honorable Mark Brandler. Further, not only did the said Donal H. Sears know and have possession of the said print in his investigation before the original trial in 1961, but the said Donal H. Sears caused a photograph to be made of the latent print, and the said latent print was used to compare with known rolled exemplars of this plaintiff and others who were suspected of the murder, and indeed, enlarged photographs were made of the said latent print, and were available before plaintiffs trial, and the same were preserved and finally made known at the evidentiary hearing before the late Thomas White, Justice of the Supreme Court of California, in 1962-1963 and related proceedings. The said defendant Donal H. Sears had full knowledge of the complete print with at least 10 to 12 possible points of comparison at the time before the said Donal H. Sears testified at the trial of this plaintiff, and continued to have possession of said print and the truth thereof, and finally before the said Justice Thomas White admitted that the complete print was not that of Paul Kern Imbler, although the said Donal H. Sears refused and reluctantly refrained from so admitting until he was pressed to do so at cross-examination at the evidentiary hearing before Justice Thomas White. The said complete print was in existence before the trial of petitioner, was preserved via enlarged photographs, was suppressed at trial, and was finally admitted to be in existence by the defendant Donal H. Sears in his testimony before the late Justice Thomas White of the Supreme Court of California at the evidentiary hearing

held in 1962-1963 and related proceedings. The full and complete latent print was found by the defendant Donal H. Sears and was known to the said Donal H. Sears during January, February, March and continuously up to and including the trial of this plaintiff in June of 1961, and the said complete prints and portions thereof were used by Donal H. Sears and the defendants Sanford McCaleb and De Witt Lightner to compare with others who were suspected of the murder of Morris Hasson.

The knowingly and wilfully suppression of the foregoing fingerprints by the defendant Donal H. Sears, the photographing of same, and the use of the same for comparison purposes, which ruled out Paul Imbler as the owner of said print, were a wilfull suppression of evidence material to the defendant, and constituted a knowing use of perjured testimony by the defendant Donal Sears, the defendant Stanford McCaleb, the defendant Richard Pachtmann, and the defendant De Witt Lightner, and constituted a criminal conspiracy and a conspiracy to deprive this plaintiff of his civil rights within the meaning of Title 42, Sections 1981-1988 of the United States Code.

Dated: March 8, 1972.

/s/ Roger S. Hanson
Attorney for the Plantiff

EXHIBIT "C" is omitted from the record here as it appears on pages 30-60 Supra.

JOHN D. MAHARG, County Counsel and
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Attorneys for Richard Pachtmann, as an individual

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civ. No. 71-123-IH

PAUL KERN IMBLER, PLAINTIFF

-vs-

RICHARD PACHTMANN, as an individual, RICHARD PACHTMANN, as an agent of the County of Los Angeles, Office of the District Attorney, et al., DEFENDANTS

NOTICE OF MOTION, MOTION TO DISMISS AND POINTS AND AUTHORITIES

TO: ROGER S. HANSON, Esq.
P. O. Box 4278
Honolulu, Hawaii
and
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PLEASE TAKE NOTICE that on Monday, November 29, 1971, at 2 P.M., or as soon thereafter as counsel can be heard, RICHARD PACHTMANN, defendant, will move this court, at Coutroom No. 11, United States Court House, 312 North Spring Street, Los Angeles, California, as follows:

To dismiss the action because the complaint fails to state a claim against the defendant, RICHARD PACHTMANN, upon which relief can be granted.

DATE: November 2, 1971

JOHN D. MAHARG,
County Counsel

By /s/ Richard G. Brungard
RICHARD G. BRUNGARD
Deputy County Counsel
Attorneys for Richard Pachtmann, as an individual

POINTS AND AUTHORITIES

I

INTRODUCTION AND FACTUAL SITUATION

Shortly after 8:30 P.M. on the night of January 5, 1961, a small grocery store in the City of Los Angeles operated by Mr. and Mrs. Morris Hasson was the subject of an attempted robbery by two men. In the course of this robbery attempt, the proprietor, Mr. Hasson, was shot and killed by one of the two men. The plaintiff, Mr. Imbler, was identified by three eye witnesses: Alfred John Costello, Billy Lou Hillen, and Alonzo Dunlap. These witnesses testified that Imbler was the person who did the shooting.

The jury found Imbler guilty of first degree murder. The case went up on automatic appeal to the Supreme Court, and the conviction was affirmed. *People* vs. *Imbler*, 57 Cal. 2d 711 (May 1962). This case is attached as Exhibit "A."

Thereafter Imbler sought a writ of habeas corpus in the California Supreme Court. The writ was denied on the basis of the Referee's findings following an evi-

dentiary hearing. *In re Imbler*, 60 Cal. 2d 554. A copy of this decision is attached as Exhibit "B."

Imbler than filed a second petition for a writ of habeas corpus in the state courts challenging solely the penalty of death. The California Supreme Court reversed the judgment imposing the death penalty. *In re Imbler*, 61 Cal. 2d 556.

Imbler then initiated habeas corpus proceedings in the Federal Courts. No factual hearings were heard by the United States District Court Judge. This Judge chose to rely upon the Reporter Transcripts of Imbler's trial and of the state habeas corpus hearing, as well as the Referee's Report thereon. Judge Ferguson rendered an opinion in April of 1969 cited as *Imbler* vs. *Craven*, 298 Fed. Supp. 797, a copy of which is attached as Exhibit "C."

After a full hearing the Supreme Court of California and the Referee appointed by them determined that the evidence did not show that prosecution knowingly used false evidence to gain the conviction of Imbler. Judge Ferguson, however, reached the opposite conclusion as set forth in his opinion.

Imbler has brought the present action pursuant to United States Code Sections 1981 through 1988 alleging denial of his civil rights and damages resulting therefrom claiming: (1) That the prosecuting Deputy District Attorney, RICHARD PACHTMANN, defendant herein, knowingly used perjured testimony against Imbler; (2) That the prosecuting Deputy District Attorney, RICHARD PACHTMANN, conspired with city police officers to deprive Imbler of his civil rights and a fair and just trial, overt acts in furtherance of said conspiracy being (a) permitting witness Costello to give perjured testimony regarding his commitment to a mental hospital; (b) permitting witness Costello to falsely testify regarding his education; (c) permitting witness Costello to testify that he was now "going straight" and "was having no further trouble with the law"; and (d) It is alleged that both the prosecuting Deputy District Attorney, RICHARD PACHTMANN, and a police officer were present in the court room when Costello made a false

statement concerning the viewing of pre-trial photographs; he further failed to correct the false testimony given by the witness Billy Hillen; (The foregoing is an attempt to briefly summarize the allegations against the prosecuting Deputy District Attorney, RICHARD PACHTMANN, and the court is referred to the fourteen-page complaint for the details of all of the allegations.)

II

PROSECUTING ATTORNEYS ARE IMMUNE FROM SUIT UNDER THE CIVIL RIGHTS ACT.

In the case of *Agnew* vs. *Moody*, 330 Fed. 2d 868 (1964) the appellant was convicted and sentenced for violation of a traffic law. He brought suit in the Federal Courts against the city prosecuting attorney, among others, for violation of 42 U.S.C. 1983, 1985, and 1986. A motion for dismissal was granted by the district court and affirmed on appeal because the plaintiff failed to state a claim for relief. The court held: (1) "We have repeatedly held that judges and 'quasi judicial' officers, including prosecuting attorneys, are immune from suit under the Civil Rights Act for conduct in the performance of their official duties." (Page 869) (2) "Appellant argued that the doctrine of judicial immunity is never a valid defense as to a charge of conspiracy, since taking part in a conspiracy is outside of the judicial function. But conspiracy was alleged in *Harmon* vs. *Superior Court*, 329 Fed. 2d 154 (9th Circuit 1964). And although conspiracy is an essential element of the offense under 42 U.S.C.A. Section 1985, the doctrine of immunity nonetheless applies to actions under that section." (Page 869)

The United States Court of Appeals affirmed the District Court dismissal of a complaint which did not state a claim upon which relief could be granted in the case of *Ney* vs. *State of California*, 439 Fed. 2d 1285 (1971). Neys complaint alleged that the police chief altered electronic tapes of an interrogation to make it appear that Ney had incriminated himself, and further

alleged that the district attorney knowingly used said altered tapes at Neys's preliminary hearing and at his trial. The court states as follows on page 1287: "As to district attorney Sorenson, the judgment (of dismissal) is also correct. Assuming, without deciding, that he would be liable for the acts of his deputy, what he or his deputy is alleged to have done was done in the course of his prosecuting function. Carrying out that function, he is immune." (Parenthetical expression added)

In the case of *Sires* vs. *Cole*, 320 Fed. 2d 877 (1963) the Federal District Court dismissed plaintiff's complaint, which was based upon the Civil Rights Act. Upon appeal the dismissal was affirmed. The complaint alleged that the plaintiff, in a criminal proceeding, had pled guilty to the theft of a calf, which offense was only a misdemeanor. The complaint alleged that the defendant prosecuting attorney, along with other defendants, wilfully abused his duties and tricked Sires with the intent to falsely imprison him. In a collateral proceeding it was determined that he was sentenced for a felony and should have only been sentenced for a misdemeanor. In sustaining the dismissal of the complaint the court stated: "Judges are immune from suit arising out of their judicial acts, without regard to the motives with which their judicial acts are performed, and not withstanding such acts may have been performed in excess of judisdiction, provided there was not a clear absence of all jurisdiction over subject matter." (Page 879) "A prosecution attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge." (Page 880)

In the case of *Diaz* vs. *Chatterton*, 229 Fed. Supp. 19 (1964) the plaintiff alleged in his complaint six overt acts on the part of defendant deputy district attorney and other defendants for conspiracy in violation of 42 U.S.C. 1985. One overt act was alleged to be the securing of a bribe of a witness to falsely testify against the plaintiff. Another overt act alleges that the deputy district attorney and other defendants suppressed evidence and falsely maintained the lawsuit out of passion and prejudice with the intent to deprive plaintiff of equal protection of the

laws and to deprive him of his freedom. On page 22 of the opinion, the court states: "The court now considers the motion to dismiss the within action, having in mind the facts and circumstances as they now appear to exist. Defendant Chatterton, being a deputy district attorney for Orange County, California, is immune from the within suit. (Citing cases)"

III

GOVERNMENT CODE OF THE STATE OF CALIFORNIA, SECTION 821.6, GRANTS IMMUNITY TO THE DEFENDANT, RICHARD PACHTMANN.

Government Code Section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

By reason of the overwhelming weight of authority it is respectfully requested that the complaint against defendant, RICHARD PACHTMANN, be dismissed.

Respectfully submitted,

JOHN D. MAHARG,
County Counsel

By /s/ Richard G. Brungard
Deputy County Counsel
Attorneys for Defendant
Richard Pachtmann, as
an individual

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Attorney for Paul K. Imbler

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 71-123-RJK

PAUL KERN IMBLER, PLAINTIFF

v.

RICHARD PACHTMAN, *et al.*, DEFENDANTS

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS CASE AGAINST RICHARD PACHTMAN, DISTRICT ATTORNEY

I

PROSECUTORS IN THE NINTH CIRCUIT ARE NOT IMMUNE IN 42 USC 1983-1985 SUITS IF THEIR ACTS ARE OUTSIDE THE NORMAL FUNCTIONS PERFORMED IN THE JUDICIAL PROCESS

This Court's attention is directed to the major decision of the United States Court of Appeals for the Ninth Circuit in *Robichoud* v. *Ronan*, 351 F. 2d 533 (October 8, 1965, CCA, 9th Cir.) a case which is subsequent to the decisions cited by the moving party in *Agnew* v. *Moddy*, 330 F. 2d 868 (1964) and *Harmon* v. *Superior Court*, 329 F. 2d 154 (1964). Anytime a district attorney engages in activity which is ordinarily related to the POLICE function causes him to lose any purported immunity that he may have when he is legitimately acting in a quasi-judicial role. In the Robichoud case, the District Attorney engaged with the police and sheriffs to deprive the plaintiff Theresa Hobichoud of her civil rights, and our ninth Circuit was quick to note that mere-

ly because the defendant was a District Attorney, he was thereby not enshrouded with some magic cloak to aid him in perpetrating any violation that would send some one who was not a District Attorney to prison for his acts.

The Court noted at page 535 of the opinion some of the traditional reasons cited for the so-called immunity, inter alia,

(1) danger of influencing public officials with threat of suit;
(2) deterent effect of potential liability on men who are considering entering public life;
(3) drain on valuable time of the official caused by "insubstantial" suits
(4) unfairness of subjecting officials to liability for the acts of their subordinates
(5) theory that the official owes a duty to the public and not to the individual
(6) the feeling that the ballot and formal removal proceeding are more "appropriate ways to enforce the honesty and efficiency" of public officers

It is submitted that if these above reasons are in any way authoritative, they border on the ludicrous. To shield a bandit District Attorney such as the one now before the Court with any degree of immunity for his unprofessional conduct that caused the plaintiff twice to be within the door of the gas chamber is reasoning that "shocks the conscience". *Rochin* v. *California*, 342 U.S. 165.

The better reasoned rule is and should be that the District Attorney may enjoy his immunity when he is HONESTLY performing this task in running his lawsuit—surely this District Court nor any thinking Court can not condone the deliberate use of perjured testimony in a capital punishment case as being "within the judicial process" so that a judge who permits it and a District Attorney who uses it and permits police officers to deliberately perjure themselves is still thereby acting within the judicial process. *God help us if that is the case.*

The Ninth Circuit has held in Robichaud that:

> "Thus, if immunities are broadly granted to state officials without consideration of the nature of their alleged misdeeds and the reason for their immunity, the statute becomes subject to circumvention, if not emasculation." ante, at page 536.

The Court goes on thereafter to hold:

> The key to the immunity previously held to be protective to the prosecuting attorney is that the acts, alleged to have been wrongful, were committed by the officer IN THE PERFORMANCE OF AN INTEGRAL PART OF THE JUDICIAL PROCESS.
>
> Question: Is the deliberate use of perjured testimony and the failure to correct perjured testimony when it is introduced in a criminal trial, and the directing of police officers to act and refrain from acting AN INTEGRAL PART OF THE JUDICIAL PROCESS??????

If this Court believes that it is, then dismiss Richard Pachtman from further liability. Concomitantly, we give the man Carte Blanche judicial approval to repeat his miserable deeds with some other poor defendant who might this time get executed and not live to seek redress under the Civil Rights act.

The District Attorney in this case performed police function activities. He directed the Los Angeles Police Officers to refrain from arresting the prize perjurer Alfred John Costello until the said Richard Pachtman had finished using the said Alfred John Costello as a witness against Imbler, and then immediately asked the said Costello whether the said Costello was "now going straight", and "Whether he was in any further trouble with the law", to which the said Costello replied that he was not, and the District Attorney failed to correct this lie. In this case, and in this instance, Pachtman was engaging in police activity by DIRECTING THE POLICE TO DO AND REFRAIN FROM DOING THEIR NORMAL FUNCTIONS, and as such he is as liable as the police for these misdeeds. In Robichaud, supra,

the District Attorney directed the police/sheriffs to take Miss Robichaud out of her jail cell to the scene of the crime, etc. as may be seen by reading said opinion. In this way, the District Attorney usurped the police role, and if these acts are wrong, he is as liable as the police in the Ninth Circuit. In the instant case, the District Attorney interacted with the fingerprint experts to suppress important fingerprints. This is his investigative role, a police function, and one from which he is not immunized and one from which he should not be immunized. In the case at bar, the District Attorney conducted personal investigative work with Costello, who told him that he, Costello, had been voluntarily placed in the mental hospital. Following that, the District Attorney Pachtman further investigated the truth and learned that the truth was that Costello had been placed in the mental hospital because of the fact he had been charged with many California felonies, and in fact had been found not guilty of some of these by virtue of his being deemed legally insane. In this role, the District Attorney was operating in the police function of investigation, and Robichaud does not cloak him with any phony immunity. Further, defendant Pachtman conducted immense investigations into the case of Paul Kern Imbler following the trial via and with the various defendant police officers, penning a letter to Governor Edmund G. Brown, advising the Governor of the results of some of the investigation, and yet did nothing about the conviction, knowing all the while that the investigative work that he, Pachtman, had engaged in clearly showed the perjury that had occurred in the trial. Further Pachtman conducted investigative work with the aid of his police officer defendant investigators, De Witt Lightner and Saford McCaleb, which revealed that Costello was within the walls of either San Quentin or State Insane Hospitals, and the defendant suffered the said Costello to give a lengthy discourse initiated by Pachtmann on how the said Costello had rehabilitated himself by two college degrees and who was now working as an engineer making $10,000 per annum. At this time, the investigative work of the defendant with his police officers

showed that the said Costello was hanging bad check paper all over town, and among his victims was the wife of the decedent, Buelah Hassen. In all of these roles, Richard Pachtman was quasi-police and was working hand-in-glove with the police element, and is not shrouded with any phony immunity.

This Court must never lose sight of the multitude of authority cited in Imbler v. Craven, 298 F. Supp. 795, holding that knowing use of perjured testimony is a denial of Due Process of Law, and automatically causes the conviction to be infirm. The knowing Denial of Due Process of Law surely is not a part of the judicial process, nor can it be part of the quasi-judicial process.

The Ninth Circuit stated at 536 in Robichaud:

> "We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity—integral relation between his acts and the judicial process—ceases to exist. IF HE ACTS IN THE ROLE OF A POLICEMAN THEN WHY SHOULD HE NOT BE LIABLE, AS IS THE POLICEMAN, IF, IN SO ACTING, HE HAS DEPRIVED THE PLAINTIFF OF RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED BY THE FEDERAL CONSTITUTION AND LAWS. . . . It is not appropriate that immunity should protect the one and not the other. . . ."

The Ninth Circuit cites with adoptive approval the case Lewis v. Brautigam, 227 F. 2d 124 (5th Cir., 1955). There the District Attorney engaged in the investigative role, and was sued for his acts, and the cause of action upheld. Ante at page 537 in Robichaud.

> The Ninth Circuit indicated that the trial Court must ". . . Determine the nature of the acts alleged to have been wrongfully committed, for the appellees may have abandoned their "quasi-judicial role". If they, so doing, committed acts, or authoritatively directed the commission of acts, which ordinarily are related to police activity as opposed to judicial

activity, then the cloak of immunity should not protect them. . . *The title of office, quasi-judicial, or even judicial, does not, of itself, immunize the officer for unlawful acts which cannot be said to constitute an integral part of the judicial process.*" Ante, page 537-538.

It must be further noted that plaintiff alleges that the District Attorney conspired with police officers who prima facie were engaged in the police-investigative role, and in so doing the District Attorney becomes a part of their police investigative role, and under Robichaud, the erstwhile Richard Pachtman is LIABLE for these police-investigative acts done outside the judicial role, or the quasi-judicial role.

In finality, the immunity granted to District Attorneys by some of the cases surely fails to withstand the test of Reason or logic. These men, of all people, sworn to uphold the law as to ALL the people, not just the "good" people, must be never given the cloak of immunity to do as they please in the Court rooms, as this gentleman Richard Pachtman has done in this case. Through the efforts of Richard Pactman, Paul Kern Imbler was almost executed twice, he served some 10 years in prison for a crime he did not commit, he was forced to undergo the highest of indignities at the behest of the State, he lost his wife, his children, his consortium, yes, even his God-given right to make love. To state that the Courts may engraft immunity to a "professional man" like Richard Pachtman certainly shocks the conscience of any thinking man. I dare say that if every judge who voted to give his ilk "immunity" would have suffered the same acts undergone by Paul Kern Imbler, there would be few opinions granting any type of immunity to the felonious conduct of Richard Pachtman.

Counsel submits that there should be no immunity granted at all to a District Attorney who fails to practice honestly and represent the People of the State of California honestly; that in any event all of the acts of Pachtman were outside of the "judicial" role or process, and were police and investigative, and as such the said

Pachtman remains liable for these acts, all of which have been previously established by the United States District Court, the Honorable Warren J. Ferguson, 298 F. Supp. 795.

Counsel attaches herewith copies of the authority relied upon by the County Counsel. In particular, it is submitted that the case Agnew v. Moody, supra, involves an apparent disgruntled plaintiff who was arrested and given a TRAFFIC TICKET, and apparently filed some type of frivolous suit against the judge, the city attorney, and others for "conspiracy". Its details are so sparse that no authority can be gleaned from it to place beside the general rule of Robichaud that liability exists if the city attorney was outside the judicial function, or the quasi-judicial function. It merely reiterates the tired cliche that these "Public attorneys" should be given immunity, to which counsel thoroughly agrees, IF THEY ARE HONEST AND ARE BEHAVING THEMSELVES AND TRYING THEIR CASE HONESTLY. No thinking advocates adheres to the filing of frivolous suits against the municipality and its employees. Agnew, handed down in 1964, hardly supplies authority for any proposition, and surely is squareable with Robichaud, supra.

Diaz v. Chatteton apparently involves a District Attorney who only filed a criminal complaint against the plaintiff Diaz—little indicates that he in doing this was acting outside his judicial or quasi-judicial role. A vague allegation of "suppression" of some statement of a witness may bring one to question whether the same was involving the District attorney with the investigative role, or the police role, condemned in Robichaud, but the Court is silent on this point. Moreover, it is a District Court opinion prior to Robichaud, and therefore it cannot be ascertained whether the District Judge even knew of the authority limiting the District Attorney to his quasi-judicial status in order to maintain his immunity. It serves little to elucidate the problem one way or the other. Sires v. Cole, attached, involved the stealing of a calf, a misdemeanor, for which the defendant erroneously was sentenced as a felon. For all that appears on the face of the case, it was an honest mistake of both the Court

and the District Attorney, which was corrected via habeas corpus, and the case is so terse that one cannot ascertain anything but that all parties were merely engaged in a simple Courtroom mistake; police roles and investigators were apparently never involved in the case. It was a 1963 decision and failed to enunciate the Robichaud line of reasoning. It is of no effect to decide the instant problem. Harmon v. Superior Court, supra, is totally devoid of facts, and one cannot predicate authority on it, but it appears to be the action filed by a disgruntled husband who was forced to pay either alimony or child support. It is a 1964 case, predating Robichaud, and apparently does not contain the problems of either Robichaud or Imbler.

Ney v. California, 439 F. 2d 1285 (1971) is perhaps the most analogous case relied upon by the County Counsel. It is difficult to square the fact that if it is alleged that the police engaged in the altering of testimony, which would clearly hold them in a civil rights suit, Monroe v. Pape, 365 U.S. 167, and that thereafter the police turned the altered tape over to the District Attorney, and the District Attorney thereafter used it in the trial knowing it was Altered, that thereby the District Attorney had not conspired in the police-investigative role. The case is simply too sparse, however, to bottom much discussion upon. If it be said that the tape was merely given to the district attorney without the district attorney asking questions, or being told anything, he may logically expect immunity. If he knowingly engages in the use of an altered tape, it defies logic that the use of altered testimony is part of either the judicial process or the quasi-judicial process. Again, God help us all if it is.

II

CALIFORNIA STATE STATUTES CAN IN NO WAY ALTER FEDERAL CAUSES OF ACTION UNDER 42 U.S.C. 1983

States cannot create defenses to the Federal Civil rights Act. Delatte v. Genovese, 273 F. Supp. 654.

The Courts attention is directed this time to the recent decision of the Ninth Circuit Donovan v. Reinbold, 433 F. 2d 738, herewith attached, for the more modern approach that these public attorneys do not enjoy unreasoned carte blanche immunity.

WHEREFORE, it is respectfully and with reason asked that the defendant Richard Pachtman's motion to escape his liability be denied.

Respectfully submitted,

/s/ Roger S. Hanson
ROGER S. HANSON
Attorney for
Paul Kern Imbler.

Copy served by mail this 23rd day of November on Richard G. Brungard, County Counsel, 648 Hall of Administration, Los Angeles, California 90012. I declare the foregoing true under the penalty of perjury.

/s/ Roger S. Hanson
ROGER S. HANSON

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil No. 71-123-RJK

PAUL KERN IMBLER, PLAINTIFF

vs.

RICHARD PACHTMANN, *et al.*, DEFENDANTS

OPINION AND ORDER GRANTING DEFENDANT RICHARD PACHTMANN'S MOTION TO DISMISS AND DIRECTING ENTRY OF FINAL JUDGMENT

Defendant Richard Pachtmann brought this motion ". . . [t]o dismiss the action because the complaint fails to state a claim . . . upon which relief can be granted," pursuant to Federal Rules of Civil Procedure 12(b)(6). The issue raised by Pachtmann is whether he is immune from liability under the Civil Rights Act, 42 U.S.C. § 1983, *et seq.*, by virtue of the doctrine of prosecutional immunity.

After a jury trial in the Superior Court of the State of California, County of Los Angeles, plaintiff was convicted of first degree murder and assault with a deadly weapon with intent to commit murder; he was sentenced to death on the murder charge and to a term of imprisonment not to exceed ten years on the assault charge. The judgment was affirmed by the California Supreme Court, *People* v. *Imbler*, 57 Cal. 2d 711, 21 Cal. Rptr. 568, 371 P.2d 304 (1962), and, thereafter, plaintiff petitioned the California Supreme Court for a writ of habeas corpus which was denied, *In re Imbler*, 60 Cal. 2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963), *cert. denied*, 379 U.S. 908, 85 S.Ct. 196. Later, plaintiff filed a second petition for a writ of habeas corpus in the State Courts challenging the trial court's instructions that in determining the penalty the jury could consider the possibility of parole after seven years imprisonment. Holding that these instructions were improper, the California Supreme

Court reversed the judgment imposing the death penalty, *In re Imbler*, 61 Cal. 2d 556, 35 Cal. Rptr. 293, 387 P.2d 6 (1964), and, on remand, plaintiff was sentenced to life imprisonment on the murder charge.

Plaintiff unsuccessfully sought a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of California, but that Court's denial of the petition was reversed by the Court of Appeals and transferred pursuant to 28 U.S.C. § 2241 (d), *Imbler* v. *Craven*, 397 F.2d 277 (9th Cir. 1968), to this District where a Judge of this Court granted the petition, *Imbler* v. *Craven*, 298 F. Supp. 795 (C.D. Cal. 1969), affirmed, *Imbler* v. *California*, 424 F.2d 631 (9th Cir. 1970), *cert. denied*, *California* v. *Imbler*, 400 U.S. 865, 91 S.Ct. 100 (1970).

Thereafter, plaintiff brought this action against Pachtmann, the Deputy District Attorney who prosecuted the criminal case in the Superior Court, and certain others. The First Amended Complaint, which the Court permitted to be filed on April 18, 1972, alleges that Pachtmann, along with certain other named defendants, conspired to commit and committed a series of acts of "deliberate malfeasance, misfeasance, non-feasance, failure to inform and correct," all designed to deprive plaintiff of life, liberty and due process of law by unlawfully charging and obtaining his conviction for murder and assault with intent to commit murder. Pachtmann is alleged to have committed these acts in his capacity as a Los Angeles County Deputy District Attorney and in his individual capacity.

As part of this conspiracy to deprive plaintiff of a fair trial, Pachtmann is alleged, knowingly, to have produced false and perjured testimony prejudicial to plaintiff in that he called as a witness one Costello, a convicted felon who had been committed to an institution for the criminally insane. Costello, allegedly with Pachtmann's knowledge, testifed falsely as to his educational background, his mental competence, his purported "viewing of pretrial photographs," and to have given untrue and prejudicial identification testimony implicating plaintiff in the criminal acts charged in his Superior Court trial;

Pachtmann allegedly did nothing to correct this use of false and perjured testimony.

It is further alleged that Pachtmann ordered officers of the Los Angeles Police Department to refrain from arresting Costello on a charge of forgery until Pachtmann had concluded his use of Costello as a witness, all of which conduct plaintiff asserts constitutes a traditionally exclusive police activity within the purview of *Robichaud* v. *Ronan*, 351 F.2d 533 (9th Cir. 1965). The First Amended Complaint also alleges that Pachtmann suppressed true and elicited false fingerprint evidence and expert testimony, acted to alter a sketch of plaintiff used for identification purposes, and, with another, suppressed the results of polygraph tests which exculpated plaintiff.

The First Amended Complaint further attempts to incorporate by reference the decision of this Court in *Imbler* v. *Craven*, 298 F. Supp. 795 (C.D. Calif. 1969), plaintiff's successful habeas corpus proceeding under 28 U.S.C. § 2254, and alleges that the findings therein made by a Judge of this Court are binding in the present action. While the Court may, of course, take judicial notice in this proceeding of matters determined in other Court actions, a plaintiff proceeding under 18 U.S.C. § 1983 must allege highly specific facts, not mere conclusory allegations, *Weyandt* v. *Mason's Stores, Inc.*, 279 F. Supp. 283 (W.D. Pa. 1968), *Pugliano* v. *Staziak*, 231 F. Supp. 347 (S.W. Pa. 1964), affirmed 345 F.2d 797 (3d Cir. 1965), and prove these allegations by a preponderance of the evidence, *Walyd* v. *Kane*, 283 F. Supp. 450 (E.D. Wis. 1968). Even though a state court adjudication may not, under certain extraordinary circumstances not here present, be res judicata against a plaintiff in a subsequent federal civil rights action growing out of the same incident, *Whitner* v. *Davis*, 410 F.2d 24 (9th Cir. 1969), the Court knows of no authority which sanctions, much less requires, that findings in a proceeding under 28 U.S.C. § 2254 be applied as res judicata or collateral estoppel in favor of a plaintiff in a subsequent federal civil rights action growing out of the same incident. Particularly is this so where, as here, the parties

defendant are different and there has been no showing of any substantiality of interest between the defendant in the habeas corpus proceeding and the present defendants. Hence, in determining the present motion to dismiss, the Court limited its consideration to the specific factual allegations of the First Amended Complaint and considers that the findings of *Imbler* v, *Craven*, *supra*, as such, have no bearing on the disposition of the present motion.

The question presented by this motion is whether the acts of Pachtmann alleged in the complaint are embraced by the immunity extended to prosecutors acting within the scope and course of their official duties. In determining the sufficiency of the First Amended Complaint to state a claim upon which relief can be granted, the Court must, of course, accept the allegations of the First Amended Complaint as true and in the light most favorable to the plaintiff. *Robichaud* v. *Ronan*, *supra*, at 534.

Basis for Prosecutor's Immunity

42 U.S.C. § 1983, upon which jurisdiction of the present action is premised, provides:

> "§ 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress."

Jurisdiction for suits brought under § 1983 is vested in the District Courts by virtue of 42 U.S.C. § 1988.

No immunity from liability for the proscribed conduct is mentioned in the statute, but the doctrine of prosecutorial immunity has been engrafted in favor of certain public officials for acts done in the course and scope of their employment. Courts have repeatedly held that public prosecutors are immunized from civil liability for acts done as part of their traditional official functions. *Dodd* v. *Spokane County*, 393 F.2d 330 (9th Cir. 1968); *Agnew* v. *Moody*, 330 F.2d 868 (9th Cir. 1964),

cert. denied, 379 U.S. 867, 85 S.Ct. 137; *Diaz* v. *Chatterton*, 229 F. Supp. 19 (S.D. Cal. 1964); *Kostal* v. *Stoner*, 292 F.2d 492 (10th Cir. 1961), *cert. denied*, 369 U.S. 868, 82 S.Ct. 1032, rehrg. denied, 370 U.S. 920, 82 S.Ct. 1559; *Puett* v. *Detroit, Dept. of Police*, 323 F.2d 591 (6th Cir. 1963), *cert. denied*, 376 U.S. 957, 84 S.Ct. 978; *Jennings* v. *Nester*, 217 F.2d 153 (7th Cir. 1954), *cert. denied*, 349 U.S. 958, 75 S.Ct. 888.

Several reasons have been advanced in support of prosecutorial immunity: (1) to avoid influencing prosecutorial decisions by threat of civil liability, (2) to avoid deterring qualified persons from entering employment as prosecutors, (3) to avoid wastefully draining prosecutors' time and energy on matters collateral to their prosecutorial functions, and (4) to encourage and enforce honesty and efficiency among prosecutors through ballot and formal removal proceedings rather than civil litigation. See *Robichaud* v. *Ronan, supra*, at 536, 537.

Scope of Prosecutorial Immunity

The courts have repeatedly asserted that the immunity afforded prosecutors and other quasi-judicial personnel is equated, in scope, with that afforded Judges. *Friedman* v. *Younger*, 282 F. Supp. 710 (C.D. Cal. 1968); *Clark* v. *State of Washington*, 366 F.2d 678 (9th Cir. 1966); *Robichaud* v. *Ronan, supra.*

This immunity is not, however, without limit and under some circumstances prosecutors lose their immunity if their acts are beyond the scope of the prosecutorial function. *Robichaud* v. *Ronan, supra*; *Corsican Productions, Inc.* v. *Pitchess*, 338 F.2d 441 (9th Cir. 1964). Thus, neither the title under which a prosecutor acts nor the characterization of his activities will suffice to bring him within the scope of the privilege. See *Robichaud* v. *Ronan, supra.* Instead, the Court of Appeals of this Circuit has said:

> "[t]he trial court must determine the nature of the acts alleged to have been wrongfully committed. . . . If . . . the commission of acts . . . are related to police activity as opposed to judicial activity, then the cloak of immunity should not protect them." *Robichaud* v. *Ronan, supra* at 537.

In Robichaud, upon which plaintiff relies, defendants prosecuted plaintiff on a charge of first degree murder. The complaint was filed with malicious motive and without probable cause, and pursuant to the charge plaintiff was arrested and placed in custody for a non-bailable offense. During her imprisonment plaintiff was taken to another county, the scene of the alleged crime, and without being afforded counsel, was threatened and intimidated in an unsuccessful effort to obtain her confession. Though there was insufficient evidence to establish probable cause for the crime charged, defendants refused to dismiss the complaint, refused to produce evidence or to proceed with a preliminary hearing and, thereby, deprived plaintiff of her rights. *Robichaud* v. *Ronan, supra*, at 534, 535.

Whether *Robichaud* answers the question here presented is unclear. It appears to affirm the traditional doctrine that acts within the course and scope of the prosecutorial function remain privileged, but the holding does not distinguish between those allegations of the complaint in *Robichaud* which come under the privilege and those which do not. Indeed, many of the acts upon which the complaint therein appears predicated would seem to be acts well within the traditional scope of prosecutorial activity. Moreover, the Court stated that a prosecutorial immunity ceases to exist when the prosecutor is no longer functioning as such, but is, instead, engaging in conduct usually associated with police activity. *Robichaud* v. *Ronan, supra*, at 536. This distinction is easier to draw than to apply. For example, investigation and interrogation of witnesses, including the accused, may properly be part of the prosecutorial activity though this activity is also associated with police activity. It is not clear from *Robichaud* whether prosecutors are to be immune from civil liability only for part of their traditional functions and, if so, whether this does not in effect, completely undermine prosecutorial immunity. In the context of the *Robichaud* case it would appear that malfeasance by way of gathering and presenting perjured testimony would come within the ambit of the privilege while directing an arrest on the basis of such

testimony would not lay within the privilege. See *Robichaud* v. *Ronan*, *supra*, at 537.

Sufficiency of the Pleadings

Though the matter before the trial court in *Robichaud* was, as here, a motion to dismiss the complaint, the Court of Appeals stated:

> "[t]he trial court must determine the nature of the acts alleged to have been wrongfully committed, for the appellees may have abandoned their 'quasi-judicial' role. If they, so doing, committed acts, or authoritatively directed the commission of acts, which ordinarily are related to police activity as opposed to judicial activity, then the cloak of immunity should not protect them." *Robichaud* v. *Ronan*, *supra*, at 537.

But the test appears to be, not whether the prosecutor acted wrongfully, but rather, whether the acts were committed by him in the performance of functions of the sort normally regarded as part of the prosecutor's role under the judicial process.

Since prosecutorial functions and duties often and inevitably overlap with and are related to police activity, the nature of a prosecutor's acts need to be evaluated in light of all the facts and circumstances present and, hence, it would appear, require inquiry into the merits of the case. The mystery here is how a determination can be made on a motion to dismiss (which function is merely to test the legal sufficiency of the allegations of the complaint) if the trial court is required to adjudicate the merits of plaintiff's case. It appears that the logical inference to be drawn from *Robichaud* is that dismissal under Fed. R. Civ. P. 12(b)(6) is not proper in a case involving prosecutorial immunity.

If this correctly interprets the effect of *Robichaud* then the present motion to dismiss must, of course, be denied. But because the complaint in this case lacks specific allegations of police-type activity by Pachtmann, it would appear that Pachtmann should be dismissed if Fed. R. Civ. P. 12(b)(6) may be applied.

The complaint does allege that Pachtmann requested police officers to refrain from arresting a witness at Imbler's trial until Pachtmann had an opportunity to complete his examination of the witness. But this act appears to have been in furtherance of Pachtmann's alleged attempt to elicit courtroom testimony against Imbler and does not appear to have an independent basis for being deemed police activity such as was the case in *Robichaud*. There, plaintiff was caused by the prosecutor and police officers to be removed from jail, taken to the scene of the purported crime and there intimidated, unsuccessfully, in an attempt to obtain her confession. A much more substantial nexus between the alleged offending conduct of the prosecutor and police activity existed in *Robichaud* than is here presented. The only other basis for connecting the conduct charged in the present complaint with police activity is the alleged attempt to ascribe certain fingerprints and police sketches as those of Imbler. Though Pachtmann is not specifically charged with this conduct, it is alleged that he is "chargeable under federal law" with this conduct carried out by others.

Except for the portions of the complaint above referred to, the remaining allegations state, in substance, that Pachtmann produced perjured and false testimony in an attempt to convict Imbler. In other words, the prosecutor is alleged to have acted badly, perhaps wrongfully and even maliciously. Regardless of how limited the scope of prosecutorial activity may properly be, it would appear that the production of testimony is well within the traditional function of prosecutors no matter how wrongfully done and, hence, within the prosecutorial privilege.

For the foregoing reasons, the Court considers dismissal under Fed. R. Civ. P. 12(b)(6) is proper, and therefore,

IT IS ORDERED that the action be and the same is hereby dismissed as to defendant Richard Pachtmann.

Nonetheless, because of uncertainty whether the application of Fed. R. Civ. P. 12(b)(6) is permissible in light of *Robichaud* v. *Ronan*, *supra*, this Opinion and Order certifies, pursuant to Fed. R. Civ. P. 54(b), that

the Court expressly determines that there is no just reason for delay and expressly directs the entry of a final judgment dismissing the action as to the defendant Richard Pachtmann; accordingly,

IT IS FURTHER ORDERED that final judgment be entered herein dismissing the action as to defendant Richard Pachtmann.

IT IS FURTHER ORDERED that the Clerk of the Court send, by United States mail, copies of this Opinion and Order to all counsel herein.

DATED: June 30, 1972

/s/ Robert J. Kelleher
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil No. 71-123-RJK

PAUL KERN IMBLER, PLAINTIFF

vs.

RICHARD PACHTMANN, *et al.*, DEFENDANTS

JUDGMENT

An order having been entered herein on June 30, 1972, dismissing this action as to defendant Richard Pachtmann, and the Court, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, having certified therein that there is no just reason for delay and expressly directing the entry of final judgment,

IT IS ORDERED, ADJUDGED AND DECREED that the action be and the same is hereby dismissed as to the defendant Richard Pachtmann.

DATED: June 30, 1972

/s/ Robert J. Kelleher
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 71-123 RJK

PAUL KERN IMBLER, PLAINTIFF

vs.

RICHARD PACHTMAN, *et al.*, DEFENDANTS

NOTICE OF APPEAL

The Plaintiff, PAUL KERN IMBLER, hereby appeals from the Judgment entered June 30, 1972, dismissing Defendant DISTRICT ATTORNEY RICHARD PACHTMAN and entering Judgment on behalf of defendant RICHARD PACHTMAN to the United States Court of Appeals for the Ninth Circuit.

DATED July 5, 1972.

HANSON & MILMAN

By: /s/ Roger S. Hanson,
ROGER S. HANSON,
Attorneys for Plaintiff

[Verification (omitted in printing)]

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 71-123-RJK

PAUL KERN IMBLER, PLAINTIFF

vs.

RICHARD PACHTMAN, *et al.*, DEFENDANTS

DESIGNATION OF RECORDS ON APPEAL

Plaintiff PAUL KERN IMBLER hereby designates the following as records on Appeal.

1. First Amended Complaint;
2. Motions to Dismiss filed on behalf of defendant RICHARD PACHTMAN;
3. Points and Authorities In Opposition to Motion to Dismiss filed by Plaintiff; and
4. Order and Judgment of June 30, 1972 granting dismissal as to RICHARD PACHTMAN.

Plaintiff desires no records pertaining to any defendant except RICHARD PACHTMAN.

DATED: July 5, 1972.

HANSON & MILMAN

By: /s/ Roger S. Hanson
ROGER S. HANSON
Attorneys for Plaintiff

[Verification (omitted in printing)]

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 72-2518

PAUL KERN IMBLER, PLAINTIFF-APPELLANT

v.

RICHARD PACHTMAN *et al.*, DEFENDANTS-APPELLEES

July 12, 1974

* * * *

Roger S. Hanson (argued) of Hanson & Milman, Beverly Hills, Cal., for plaintiff-appellant.

Richard G. Brungard, Deputy County Counsel (argued), Los Angeles, Cal., for defendants-appellees.

Before KOELSCH, HUFSTEDLER and KILKENNY, Circuit Judges.

KOELSCH, Circuit Judge:

This matter has a long history. In 1961 plaintiff-appellant Imbler was convicted on a murder charge in Los Angeles Superior Court and sentenced to death. The California Supreme Court affirmed. People v. Imbler, 57 Cal.2d 711, 21 Cal. Rptr. 568, 371 P.2d 304 (1962). Thereafter, Imbler's state habeas corpus petition was denied following an evidentiary hearing. In re Imbler, 60 Cal.2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963). A subsequent writ set aside the death penalty, In re Imbler, 61 Cal.2d 556, 39 Cal.Rptr. 375, 393 P.2d 687 (1964); and when the state declined to prosecute another "penalty trial," Imbler was given a life sentence.

In 1969 the United States District Court, concluding that Imbler's conviction was secured in part by testimony the prosecution knew, or had strong reason to know, was perjured, granted him a writ of habeas corpus. Imbler v. Craven, 298 F.Supp 795, 809 (1969). We affirmed, Imbler v. Craven, 424 F.2d 631 (9th Cir. 1970), cert. denied 400 U.S. 865, 91 S.Ct. 100, 27 L.Ed.2d 104.

Imbler then brought this suit for damages. So far as need be noticed, his allegations in substance are that the defendant Pachtman, the district attorney who prosecuted the criminal charges on behalf of the State of California, had knowingly, maliciously, etc., used perjured testimony to secure a conviction and hence was liable in damages for violation of his, Imbler's civil rights. The district judge dismissed Imbler's complaint as to Pachtman without leave to amend; he ruled that Pachtman, as a prosecuting attorney, enjoyed an immunity from suit for acts committed "in the performance of duties constituting an integral part of the judicial process . . .", Marlowe v. Coakley, 404 F.2d 70 (9th Cir. 1968); *see* Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965); and that as a matter of law the acts complained of came within a quasi-judicial prosecutorial function to which immunity attached. Imbler appeals.[1] We affirm.

[1, 2] The district court's dismissal of appellant's claim was consistent with our prior decisions. Ney v. State of California, 439 F.2d 1285 (9th Cir. 1971); Donovan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970); Marlowe v. Coakley, *supra*; Clark v. Washington, 366 F.2d 678 (9th Cir. 1966); Robichaud v. Ronan, *supra*; Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964); Harmon v. Superior Court, 329 F.2d 154 (9th Cir. 1964); Sires v. Cole, 320 F.2d 877 (9th Cir. 1963). The acts of the defendant which allegedly harmed appellant occurred during prosecutorial activities which can only be characterized as an "integral part of the judicial process." [2]

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[1] As appears from the caption, there are several defendants. In ruling against Imbler the court directed entry of judgment immediately, R. 54(b), F.R.Civ.P. The appeal from the ensuing limited judgment is thus valid.

[2] The dissent argues that deliberate suppression of evidence or subornation of perjured testimony is unprotected by quasi-judicial immunity because such acts, being improper exercises of prosecutorial power, are into an integral part of the judicial process; the dissent therefore concludes that our prior cases do not confer immunity when the complaint charges knowing and malicious abuse of prosecutorial power. The purported distinction undermines the purpose of the absolute immunity previously recognized, because the additions of an easy to make but difficult to prove charge of

All involved the questioning of a witness during the 1961 criminal prosecution.[a]

[3] Appellant, in effect, urges us to reject the doctrine of prosecutorial immunity and overrule a long line of this court's decisions. We decline to do so. The protection given a prosecutor acting in his quasi-judicial role protects not simply the prosecutor, but, more importantly, the effective operation of the judicial process, and hence the "common good." Because both the honest and dishonest are insulated, on occasion an injury without redress inevitably results; but, as well expressed by Judge Learned Hand:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The jurisdiction for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." Gregorie v. Biddle, 177 F.2d 579 (2d Cir. 1949).

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knowing and malicious prosecutorial misconduct to any complaint would suffice to require a full trial on the merits of the prosecutor's conduct while acting as a judicial officer.

More importantly, the distinction is clearly inconsistent with our prior cases. In Robichaud v. Ronan, *supra*, the court indicated that a prosecutor's immunity is absolute when engaged in quasi-judicial activities, noting that no suit for malicious prosecution could be brought regardless of the existence of malice or even willfulness on the part of the prosecuting attorney. *See* 351 F.2d at 536. Equally in point is Marlowe v. Coakley, *supra*; the dissent's "monumental distinction" of *Marlowe* is spurious. The complaint there alleged that the prosecuting attorney knowingly and willfully, or with gross negligence, presented perjured testimony to the grand jury investigating plaintiff's activities and that he suppressed from the grand jury exculpating evidence within his knowledge, again willfully and deliberately. In ruling on the district court's dismissal under Rule 12(b)(6), the court necessarily had to evaluate the claim assuming that the charges of willful perjury and suppression were true. Notwithstanding these allegations, the court held that the district attorney, in presenting evidence to the grand jury, was acting within the scope of his duty to advise and present information to the grand jury, and that this function is an integral part of the judicial process. In short, the dissent's approach to prosecutorial immunity has been rejected in this circuit.

[a] Appellant contends the defendant engaged in non-immune police activity when he asked two police officers, seeking, during a recess in the trial, to discuss a criminal charge with the prosecution's chief witness, to wait until the end of the witness's testimony. We reject the contention. A prosecutor's request for an opportunity to complete an examination during a trial is a quasi-judicial act within the purposes of the immunity. More critically, the request to the police did not in itself deprive appellant of any civil right. Even if the defendant had then been acting in a police role, only the subsequent inducement of the testimony that the witness was trying to "straighten out," when the prosecutor had good reason to know the witness was in trouble, made the request to the officers legally relevant to appellant's civil rights; the questioning of a witness at trial is within a traditional prosecutorial function.

As indicated earlier, the issue is not *"res nova"* in this circuit.[4] The "balance between the evils inevitable in either alternative" has consistently been struck in favor of protecting honest criminal prosecution, at the expense of those injured by scoundrels,[5] by granting immunity from suit to all prosecutors.[6]

The judgment is affirmed.

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[4] The dissent's reliance on the Supreme Court's latest pronouncement on the subject of immunity. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683. 40 L.Ed.2d 90 (1974), holding that state executive officials are not absolutely immune from suit, is misplaced. If anything, *Scheuer* tends to support our conclusion. The Court there recognized (*Scheuer* at 239 n. 4, 94 S.Ct. 1683; *see* Pierson v. Ray, 386 U.S. 547, 553-555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967)) that the immunity of executive officers has historically "been of a more limited nature" than that of judicial officers—undoubtedly because the threat of private liability as a sanction for abuse of power is less necessary in the judicial system, which provides institutionalized systems of review to correct errors. Prosecutorial immunity is not a form of executive immunity, but rather a form of judicial immunity, Robichaud v. Ronan, *supra*, 351 F.2d at 536, designed to protect the judicial process; it attaches only to prosecutorial acts "constituting an integral part of the judicial process."

[5] The reference is general and not intended as personal.

[6] Appellant contends, in substance, that the district court's determination in the habeas proceeding established defendant's violation and therefore assures that an "innocent" prosecutor is not being made to face a trial and potential liability. Wholly aside from the fact that the California Supreme Court, on precisely the same facts available to the district court (the district court did not hold an evidentiary hearing and relied on the factual findings of the referee in the California Supreme Court's habeas proceeding), found there was no evidence that the prosecutor knowingly used perjured testimony. In re Imbler, *supra*, 60 Cal.2d at 565, 35 Cal. Rptr. 293, 387 P.2d 6, those determinations are not *res judicata* as to the defendant: he was not a party to the habeas proceeding. Here, as in any other § 1983 suit against a prosecutor, a determination of the claim would require a full trial. The burden and risk of that trial is precisely what the immunity is designed to prevent. If one prosecutor must face the risk of liability because of an ill-grounded exception to absolute immunity, then all potentially may, and the public purpose of the immunity is lost.

KILKENNY, Circuit Judge (dissenting):

Although appellant's 22 page amended complaint, with 23 pages of exhibits, is admittedly repetitious and in places ambiguous, there is no question but that it charges appellee, Pachtman, with knowingly, wilfully and maliciously using eight different items of false material testimony in securing appellant's initial conviction. If this is true, I believe that appellee violated appellant's procedural due process rights, and that he should be stripped of his official or representative character and subjected in his person to the consequences of his individual conduct.

The Supreme Court decision in Scheuer, Adm'x. v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), the most recent expression of the Court on the overall subject, convinces me that, on these charges, the appellee does not have quasi-judicial, or any other immunity. True enough, Scheuer involved state executive, rather than judicial immunity. However, the Court in Scheuer, analyzed the long history behind executive, as well as judicial immunity, and noted that there was a ". . . similarity in the controlling policy considerations in the case of high echelon executive officers and judges . . ." (94 S.Ct. at 1691, n. 8); the policy considerations revolving, in large measure, around the continued assurance that public officials will continue to vigorously perform their public functions without threat of harassment by civil suit. All this being said, the Supreme Court went on to hold that high executive officers do not have an unqualified immunity from civil suit. The Court emphasized:

> "Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer has 'the qualify of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government.' Sterling v. Constantin, 287 U.S. 378, 397 [53 S.Ct. 190, 77 L.Ed. 375] (1932)." 94 S.Ct. at 1692.

If, as held in *Scheuer*, the highest executive officer of a great state is not clothed with absolute immunity and, assuming that the policy considerations behind executive immunity are similar to those behind judicial immunity, then it must necessarily follow that a prosecuting attorney, shielded only by a form of judicial immunity (Robichaud v. Ronan, 351 F.2d 533 (CA9, 1965)), should not be elevated to a status which would place him above the chief executive officer of his state. Otherwise, the office of the district attorney, rather than the Constitution of the United States, becomes the Supreme Law of the land. Of course, under our system of government, such a conclusion is clearly untenable. State officials in these circumstances should not escape the paramount authority of the Federal Constitution. I quote from Sterling v. Constantin, 287 U.S. 378, 398, 53 S.Ct. 190, 195, 77 L.Ed. 375 (1932):

> "When there is a substantial showing that the exertion of state power has overridden private rights secured by [the] Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

Aside from my view that *Scheuer* is controlling, the cases cited by the majority, in my opinion, are clearly distinguishable. For example, in Ney v. State of California, 439 F.2d 1285 (CA9 1971), the appellant charged the district attorney, or his deputy, with knowingly using altered tapes. The facts revealed, however, that the district attorney's deputy actually used the tapes and, therefore, if the district attorney could be sued at all, he would be liable only on a theory of *respondent superior*. In *Ney*, this court stressed that the allegation of fact supporting the purported misconduct was based on ". . . much conclusionary language . . . ." 439 F.2d at 1287. In the instant case, the factual allegations charge the district attorney with engaging in specific instances of misconduct wholly reprehensible to the integrity of the judicial process.

Donovan v. Reinbold, 433 F.2d 738 (CA9 1970), is no more enlightening. There, the action was against two city police officers and two city attorneys. The court held that the doctrine of immunity from civil suit under § 1983 would not bar an action against them. Nothing in *Donovan* even remotely indicates that a civil rights action should not lie on our facts. For that matter, the opinion recognizes that:

> "[t]he purpose of according judicial immunity is to protect the integrity of the judicial process. It is not to shield lawyers *or judges* from liability for the invasion of another's federally secured constitutional rights, when the alleged invasion did not occur during the performance of acts that are an integral part of the judicial process." 433 F.2d at 743. [Emphasis supplied]

To now hold, on our facts, that the knowing, wilful and malicious use of perjured testimony to gain a conviction, even though accomplished during the course of a trial, constitutes an integral part of the judicial process, flies in the very face of the integrity sought to be protected by judicial and quasi-judicial immunity.

The allegations in Marlowe v. Coakley, 404 F.2d 70 (CA9 1968) charged the prosecuting attorney with ". . . knowingly and wilfully, *or with gross negligence*, present[ing] perjured testimony to the grand jury . . . ." [Emphasis supplied] Needless to say, there is a monumental distinction between charging an officer with gross negligence in connection with the presentation of perjured testimony and charging him with knowingly, wilfully and maliciously *using* perjured testimony to obtain a conviction. Consequently, the decision of the *Marlowe* court could well rest on the failure of the complainant to clearly charge wilful misconduct in presenting the perjured testimony. *Cf.* Ney v. State of California, *supra*, 439 F.2d at 1287. The alternative does not equate with wilful action. I decline to hold that the shield of immunity should rest on the brow of a district attorney who *knowingly, wilfully and maliciously* utilizes perjured testimony to obtain a conviction. This conduct should

not be condoned as an *integral part of the judicial process.*

Clark v. State of Washington, 366 F.2d 678 (CA9 1966), recognizes the rule that a prosecuting attorney enjoys immunity under the Civil Rights Act only insofar as his prosecuting functions are concerned. At the risk of being repetitive, I again stress that appellee's acts, as charged in the amended complaint, had nothing to do with his *legitimate* prosecutory functions.

In Agnew v. Moody, 330 F.2d 868 (CA9 1964), cert. denied 379 U.S. 867, 85 S.Ct. 137, 13 L.Ed.2d 70, the court there sidestepped the contention that the doctrine of official immunity did not apply where the wrongful act was *of an extraordinary character*, as that phrase was used in Tenney v. Brandhove, 341 U.S. 367, 378-379, 71 SCt. 783, 95 L.Ed. 1019 (1951), by saying, "[i]f such an indefinite exception to the immunity rule exists, we are satisfied that appellant's case does not fall within it." 330 F.2d at 869. *Scheuer, supra*, makes it clear that the doctrine of official immunity does not apply in cases where the wrongful act is of an extraordinary character.

Hilliard v. Williams, 465 F.2d 1212 (CA6 1972), cert. denied 409 U.S. 1029, 93 S.Ct. 461, 34 L.Ed.2d 322, is closely in point. There, the court, in a civil rights action, recognized the general rule that a prosecuting attorney, when acting in his official capacity, is immune from a suit for damages. The court then goes on to hold that the doctrine of quasi-judicial immunity, normally shielding a prosecuting attorney, should not be extended to the situation where a complaint charges that the official deliberately suppressed material evidence which resulted in the conviction of the appellant. The court emphasized that such wilful conduct was ". . . outside [the officer's] quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.'" 465 F.2d at 1218.

On the charges before us, I would hold that appellee acted entirely outside the scope of his jurisdiction and should not be permitted to shelter himself from liability by a plea that he was acting under the immunity of his

office. Not to be forgotten is the high responsibility accepted by a prosecuting officer when he enters upon the duties of his office. For example: (1) he is required to recognize that in our system of justice, the accused is to be given the benefit of all reasonable doubt; (2) his decisions during the course of the prosecution must be fair to all, including the defendant; (3) he has a duty of timely disclosure to the defense of all available evidence known to him that tends to help the defendant, and (4) it is his duty to seek justice, not pervert it by placing a conviction above the constitutional rights of the accused. It is time to recognize that prosecutors are not entirely above the law which holds other individuals financially accountable for their *international misdeeds.*

Needless to say, I express no opinion as to the merits of appellant's claims. I only say that on the basis of the allegations in the amended complaint, he is entitled to have a full-fledged judicial inquiry.

I would reverse.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-2518

PAUL KERN IMBLER, PLAINTIFF-APPELLANT

vs.

RICHARD PACHTMAN, DE WITT LIGHTNER, SANFORD MCCALEB, DONAL H. SEARS, KENNETH SCARCE, and ECTOR A. GARCIA, DEFENDANTS-APPELLEES

Before: KOELSCH, HUFSTEDLER and KILKENNY, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING IN BANC

Judges Koelsch and Hufstedler voted to deny the petition for panel rehearing and to recommend against a rehearing in banc. Judge Kilkenny voted to grant the panel rehearing and recommended that the in banc rehearing be granted.

The full court having been duly advised and no judge of the court in active service having requested a vote on the suggestion for rehearing in banc, the petition for rehearing is denied, and the suggestion for rehearing in banc is rejected.

SUPREME COURT OF THE UNITED STATES

No. 74-5435

PAUL KERN IMBLER, PETITIONER

v.

RICHARD PACHTMAN

ORDER ALLOWING CERTIORARI—Filed February 24, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

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